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(19,097.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 131.

WILLIAM H. McCAFFREY, EDWARD QUIGLEY, ET AL., APPELLANTS,

vs.

LIZZIE C. MANOGUE, GEORGE W. MANOGUE, AND FRANK FOLEY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1904.

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a *Transcript of Record.*

Court of Appeals, District of Columbia, April Term, 1903.

WILLIAM H. MCCAFFREY, JAMES B. MCCAFFREY, EDWARD Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, their Guardian *ad litem*, Appellants,
vs.
LIZZIE C. MANOGUE, GEORGE W. MANOGUE, and FRANK Foley.
} No. 1318.

Appeal from the supreme court of the District of Columbia.

Filed May 11, 1903.

1 In the Court of Appeals of the District of Columbia.

WILLIAM H. MCCAFFREY ET AL., Appellants,
vs.
LIZZIE C. MANOGUE ET AL.
} No. 1318.

Supreme Court of the District of Columbia.

WILLIAM H. MCCAFFREY and JAMES B. McCaffrey, Complainants,
vs.
LIZZIE C. MANOGUE, GEORGE W. MANOGUE, Catherine Quigley, Margaret Quigley, Mary Quigley, Edward Quigley, Joseph Quigley, and Frank Foley, Defendants.
} No. 23390. Equity.

UNITED STATES OF AMERICA,
District of Columbia,
} *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

Bill.

Filed Jul- 1, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM H. MCCAFFREY and JAMES B. McCaffrey, Complainants, *vs.* LIZZIE C. MANOGUE, GEORGE W. MANOGUE, Catherine Quigley, Margaret Quigley, Mary Quigley, Edward Quigley, Joseph Quigley, and Frank Foley, Defendants.	Equity. No. 23390, Doc. 52.

The bill of complaint of William H. McCaffrey and James B. McCaffrey shows:—

1. Complainant William H. McCaffrey is a resident of the District of Columbia, and complainant James B. McCaffrey is a resident of Hot Springs, Arkansas. They sue in their own right as hereinafter shown.

2 2. The defendants are all residents of the District of Columbia, and each is sued in his or her own right. The defendants Catherine L. and Edward Quigley also being sued as trustees under the will of Mary A. Quigley. The defendants Mary Quigley, Joseph Quigley and Frank Foley are infants under the age of twenty-one (21) years, that is to say, of the ages of about sixteen (16) years, nineteen (19) years, and eighteen (18) years, respectively.

3. Complainants further show that they are sons of Hugh McCaffrey, late of the District of Columbia, who departed this life on, to wit, the ninth day of March, 1897, leaving surviving him as his only heirs at law his children James B. McCaffrey, William H. McCaffrey, Francis T. McCaffrey, Lizzie C. Manogue and Mary A. Quigley, and his grandson the defendant Frank Foley, who is the son of his daughter Catherine, deceased. Complainants further show that the said Mary A. Quigley afterward, to wit, July 10, 1897, died leaving as her only heirs her four children, the defendants Catherine L., Margaret, Mary and Joseph Quigley, and leaving a husband, the defendant Edward Quigley, and leaving a will, afterwards duly admitted to record, whereby she devised all her estate in trust to Catherine L. and Edward Quigley, in trust for her children. The said Francis T. McCaffrey, son of the said Hugh, died October 20, 1898, testate and unmarried, his heirs at law being his brothers and sister above named, the children of his said deceased sister, Mary A. Quigley, and the said Frank Foley, his nephew.

4. Complainants further show that by the will of the said Hugh McCaffrey, duly proven and admitted to probate, and record in the

supreme court of the District of Columbia and dated on the thirtieth (30) day of April, 1896, said testator undertook to divide and distribute all his estate, both real and personal, among his several children and his grandchild, the said Frank Foley. Said will was in the following words and figures, that is to say:—

"WASHINGTON, DISTRICT OF COLUMBIA,
April Thirtieth, 1896.

In the name of God, being now in good health and sound in mind and body I hereby certify and declare this to be my last will and testament, hereby annulling and revoking any and all wills previously made.

I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5, in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square number 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock. She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetrey.

3 I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight (868).

To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

2. To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, being part of lot number twenty (20) in square eight hundred and forty-one (841), also my horse and buggy.

And to my grandson, Frank Foley, I give and bequeath house number one hundred and twenty-one (121) Eleventh street, S. E., being in lot number fourteen (14), square number nine hundred and sixty-eight (968), and lot on which it stands.

To my grandson Joseph Quigley, I give and bequeath my watch and chain.

I hereby name and appoint as executors of this my last will and testament, John E. Herrell and Patrick Maloney.

All the real estate herein described is located in the city of Washington, District of Columbia.

HUGH McCAFFREY. [SEAL.]

In the presence of the testator and of each other we have hereunto set out signatures as witnesses to the signature of Hugh McCaffrey, who signed the same in the presence of us and each of us and declared the foregoing instrument to be his last will and testament.

MAURICE OTTERBACK,
1100 *9th St. S. E., Wash'n, D. C.*
JOHN RIORDON,
922 *Pa. Ave. S. E., Wash'n, D. C.*
HENRY H. McKEE,
127 *4th St. S. E., Wash'n, D. C.*"

4. Complainants further show that the several parcels of real estate mentioned in said will were all owned in fee simple absolute by the said Hugh McCaffrey, and were all the real estate owned by him at the time of the making of his said will and at the time of his death; and the personal property by said will bequeathed was all that he owned at his death except about one hundred (100) dollars in money and a small amount of household furniture.

5. This complainant James B. McCaffrey heretofore sold and conveyed to the defendant George W. Manogue, as in fee simple, the real estate devised to him by said will, that is to say house number 602 East Capitol street and lot on which it stands as well as all other interest in his said deceased father's estate, but said William H. McCaffrey retains the property by said will devised to him, to-wit, "house 604 East Capitol street being in lot number ten (10) in square number eight hundred and sixty-eight (868) and lot on which it stands."

4

6. Complainants further show that the last will and testament of the said Francis T. McCaffrey, who, as aforesaid stated, died after his said father, to-wit, October 20, 1898, was in words and figures following, that is to say.

I, Frank T. McCaffrey, of the city of Washington, District of Columbia, hereby revoking any and all wills by me at any time heretofore made, do make, publish and declare this to be my last will and testament; that is to say:

I direct my executor hereinafter named to pay all my just debts out of any estate which I may own at the time of my death.

I give, devise and bequeath any and all estate, real, personal or mixed, wheresoever the same may be situated and whensoever the same may be acquired by me, which I may own, or in which I may have any interest, or to which I may be in any manner entitled at the time of my death, to my beloved sister, Lizzie C. Manogue and to my beloved brothers, William H. McCaffrey and James B. McCaffrey, in equal shares.

To have and to hold the sale unto the said Lizzie C. Manogue, William H. McCaffrey and James B. McCaffrey, absolutely and in fee-simple, according to the nature of the property, as tenants in

common but not as joint tenants, it being my will that my said sister Lizzie and my said brothers William H. and James B. shall each receive one-third part of my estate aforesaid absolutely and in fee-simple, according to the nature of the property.

I nominate, constitute and appoint my beloved brother William H. McCaffrey to be the sole executor of this my last will and testament, and request that he be not required to give bond for his faithful performance of his duties as such.

In testimony whereof, I have hereunto set my hand and seal this eighteenth day of October, A. D., 1898.

his
FRANK T. x McCAFFREY. [SEAL.]
mark.

Witnesses to mark:

OSCAR LUCKETT.
MARGARET B. FIELDS.
ELIZABETH S. MALLET.

Signed, sealed, published and declared by the above-named testator, Frank T. McCaffrey, in our presence who, in his presence and at his request and in the presence of each other, have subscribed our names as witnesses thereto.

OSCAR LUCKETT.
MARGARET B. FIELDS.
ELIZABETH S. MALLET.

5 Complainants show that at the time of the death of the said Francis T. McCaffrey he was seized and possessed of the said premises, part of lot 20, in sq-are 841, so as aforesaid devised to him by his father, Hugh McCaffrey, and it was the true intent and meaning of his said will that this property should pass in fee simple to these complainants and the said Lizzie C. Manogue as equal tenants in common.

But so it is that upon endeavoring to make sale of the said premises as owners in fee simple thereof, it was and yet is suggested by persons who would otherwise purchase the same that it is doubtful if the said Francis T. McCaffrey was possessed of a fee simple title to said property upon which his will aforesaid might operate, or if any one of the devisees of the said Hugh McCaffrey took more than an estate for his or her life in the premises devised, a reversionary right to each of said parcels remaining to the heirs at law of said Hugh; for that the said several devises are made without words of inheritance and do not in terms declare that any of them is a devise in fee simple: Wherefore doubt has arisen as to the extent and right of your complainant and the said Lizzie C. Manogue in said property so devised by said Hugh McCaffrey to Francis McCaffrey and by the latter devised to the complainants and the said Lizzie, and as to the right of your complainant William H. McCaffrey in the premises

604 East Capitol street so devised to him by said Hugh McCaffrey, and a cloud is cast upon said several titles, the suggestion of defect being in substance that the said Francis T. McCaffrey and the said William H. McCaffrey each took only an estate for life under the said devises, and that at the death of said Francis the said property 519 East Capitol street reverted to the estate of said Hugh and became the property of his heirs at law, that is to say of these complainants and the defendants (excepting George W. Manogue) according to their several rights as children and grandchildren of the said Hugh, the said George W. Manogue having by assignment from the complainant James B. his rights therein. Your complainants are advised, and so aver, that the said will of Hugh McCaffrey was operative to vest in each of the said devisees an estate in fee simple in the premises devised to him and that the absence of words of inheritance in the said paragraphs in which the said Francis T. McCaffrey and the said William H. McCaffrey are named is not a controlling fact in the construction of said will; in view of the other facts hereinbefore stated and further, that because there was by the said will imposed upon the said Mary A. Quigley the personal duty to pay the funeral expenses and the legal debts of the testator an estate in fee simple passed to her, the said Mary, in the several parcels of land devised to her, although there was in said devise no words of inheritance, and because it is apparent from the said devise to the said Mary that it was the clear intention of said testator to invest her with all his title in the said several lots so devised to her, that such intention must be found to have existed in respect to the several other devises so by said will made to the said
6 James B. McCaffrey, William H. McCaffrey, Lizzie C. Manogue, Francis T. McCaffrey and Frank Foley, similar language being employed in each of these devises as is employed in the said devise to Mary A. Quigley.

Complainants are advised that they are entitled to have the said will of the said Hugh McCaffrey construed by this honorable court as to the devises so made to the said Francis T. McCaffrey and the said William H. McCaffrey, and to have it determined what estate each of the said devisees took thereby, and to have their title quieted as against any person or persons who may claim adversely to the same as heirs of said Hugh McCaffrey or under such heirs.

The premises considered, your complainants pray as follows:—

Prayers.

1. That process of subpœna may issue against the said defendants Lizzie C. Manogue, George W. Manogue, Catherine L. Quigley, Margaret Quigley, Mary Quigley, Joseph Quigley, Edward Quigley, and Frank Foley, and that they may be required to answer this bill upon their corporal oaths.

2. That a guardian or guardians *ad litem* may be appointed to

appear and answer on behalf of the said infant defendants Mary Quigley, Joseph Quigley and Frank Foley.

3. That a decree may be passed construing the will of the said Hugh McCaffrey, and declaring that by the devise therein to Francis T. McCaffrey, said devisee, took all the estate which the said Hugh McCaffrey had at his death, in the premises so devised, that is to say premises 519 East Capitol street and that by the devise to the complainant William H. McCaffrey of premises 602 East Capitol 4* street he took all the estate which the said Hugh had therein at his death, that is to say, an estate in fee simple in each case.

4. That complainants may have such other and further relief as the nature of the case may require and the court has power to grant.

The defendants to this bill are Lizzie C. Manogue, George W. Manogue, Catherine L. Quigley, Margaret Quigley, Mary Quigley, Edward Quigley, Joseph Quigley and Frank Foley.

WILLIAM H. McCAFFREY,
JAMES B. McCAFFREY,
By O. B. HALLAM.

HALLAM & HALLAM,
BIRNEY & WOODARD,
Attorneys for Complainants.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the bill of complaint by me subscribed, and know the contents thereof, and that the facts
7 therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

WILLIAM H. McCAFFREY.

Sworn to and subscribed before me this 1st day of July, 1902.

[NOTARIAL SEAL.]

WILLIAM ABBE,
Notary Public, D. C.

Order Appointing Oscar Luckett Guardian.

Filed July 7, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL.
} No. 23390. In Equity.

It appearing to the satisfaction of the court that the defendant Frank Foley is an infant over the age of fourteen years, and the said

[* In pencil in copy.]

Frank Foley having been duly served with process, and being now present in court and the said Frank Foley having in open court selected Oscar Luckett to be his guardian *ad litem* herein, it is by the court this seventh day of July, 1902, adjudged, ordered and decreed that said Oscar Luckett be and he hereby is appointed guardian *ad litem* for said infant defendant Frank Foley to appear and answer herein for him.

E. F. BINGHAM,
Chief Justice.

Order Appointing Edward Quigley Guardian.

Filed July 14, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL., Plaintiffs,
vs.
LIZZIE C. MANOGUE ET AL., Defendants.
} In Equity. No. 23390, Docket 52.

The defendants Mary Quigley and Joseph Quigley, infants over the age of 14 years appeared personally in court and made choice of their father Edward Quigley as their guardian *ad litem*.

It is therefore, this 14th day of July, 1902, ordered that said Edward Quigley be and he is hereby appointed as guardian *ad litem* to defend for said infant defendants.

E. F. BINGHAM,
Chief Justice.

8 *Answer of Frank Foley, by His Guardian ad Litem.*

Filed November 1, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL.
} No. 23390.

The answer of Frank Foley, by his guardian *ad litem*, to the bill of complaint of the above named complainant against him and others in chancery exhibited.

This defendant being an infant under the age of twenty-one years can neither admit nor deny any of the matters and things in the said bill contained, and submits his rights in the premises to the protection of the court.

FRANK FOLEY,
By OSCAR LUCKETT,
His Guardian ad Litem.

I do solemnly swear that I have read the annexed and aforegoing answer by me subscribed and know the contents thereof and that the matters and things therein stated on my personal knowledge are true and those stated on information and belief I believe to be true

OSCAR LUCKETT.

Subscribed and sworn to before me this 1st day of November, 1902.

J. R. YOUNG, *Clerk*,
By M. A. CLANCY, *Ass't Clerk*.

Answer of Mary Quigley et al., by Guardian ad Litem.

Filed November 4, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL., Plaintiffs,
vs.
LIZZIE C. MANOGUE ET AL., Defendants. } In Equity. No. 23390.

The defendants Mary Quigley and Joseph Quigley answering by their guardian *ad litem*, Edward Quigley, say that they are infants and know nothing of the matters and things alleged in the bill of complaint and that they submit their rights to the protection of the court.

EDWARD QUIGLEY,
Guardian ad Litem.

9 Subscribed and sworn to before me this 4th day of October, 1902.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, Jr., *Ass't Clk*.

Answer of Defendant Lizzie C. Manogue.

Filed January 27, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL., Complainants,
vs.
LIZZIE C. MANOGUE ET AL., Defendants } Equity. No. 23390.

Comes now the above-named Lizzie C. Manogue, party defendant herein, and, for separate answer to the bill of complaint herein, says

1, 2, 3, 4 and 5. She admits the averments contained in the first, second, third, fourth and fifth paragraphs of said bill, except that, for greater certainty, she insists that there be filed herein a duly authenticated copy of the last will and testament of Hugh McCaffrey, deceased, instead of the unauthenticated copy thereof which is purported to be set forth in said paragraph four.

6. She admits the death, testate, of Francis T. McCaffrey, as in said paragraph six alleged; but, for greater certainty, she insists that, so far as the same may be, or hereafter become, material or important herein, a duly authenticated copy of the last will and testament of said Fran-is T. McCaffrey, deceased, be filed herein instead of the unauthenticated copy thereof which is purported to be set forth in said paragraph.

She admits that, according to the terms of the said last will and testament of said Francis T. McCaffrey, it was evidently his purpose and intention to pass, to the devisees therein named, including this defendant as tenants in common, an estate in fee simple in and to the property by him therein and thereby devised; but she is advised, and, therefore, so avers, that in law, no greater estate or interest therein was or could be by him devised than he possessed.

She admits that question has arisen whether the said Francis T. McCaffrey was possessed in fee simple of the property so by him attempted to be devised in fee simple, as aforesaid, as well also whether any one of the several devisees under the last will and testament of the said Hugh McCaffrey, deceased, took more than an estate for life, with remainder to the heirs at law of said last-named testator, inasmuch as said several devises are, and each thereof is, made without words of inheritance, and do not, either in express terms, or otherwise however, declare that any or either thereof is a devise in fee simple.

She further avers that, in certain proceedings in equity here-
10 tofore instituted by the complainants herein against this respondent, for the partition of the property so attempted to be devised, in fee simple, by the said Francis T. McCaffrey, and in which a decree of sale was passed, and trustees appointed, certain of the property so devised was sold; but that, thereafter, upon proceedings in that behalf therein had, the purchaser thereof was relieved of said purchase because of the question as aforesaid, as to the extent of the interest possessed by said testator, the said Francis T. McCaffrey, in the property so attempted to be devised, namely, whether he was seized and possessed in fee simple, absolute, or was merely possessed of a life estate therein; and that the order and decree of this court, so relieving said purchaser, as aforesaid, was, subsequently, affirmed, on appeal, by the Court of Appeals of the District of Columbia, because of the same question and doubt, as aforesaid; as will more fully appear by reference to the proceedings in said cause had, and now remaining of record in this court, in equity, No. 22,346, reference to all of which proceedings so had in said cause is hereby made.

For further answer to the averments in said paragraph contained, this defendants says, that she is advised, and, therefore, so avers, that upon the true construction of the last will and testament of the said testator, Hugh McCaffrey, deceased, an estate in fee simple in and to the several pacels of real estate therein and thereby devised did not pass to the several devisees therein named, nor to any or either of them, but that merely a life estate passed in respect of each and every of said several devisees, with remainder, in fee, to the heirs at law of him, the said Hugh McCaffrey.

Wherefore, the premises considered, this defendant prays, that such decree be entered herein as may be appropriate and necessary to affirmatively declare that the said several devises in the last will and testament of the said Hugh McCafferty, deceased, contained, as aforesaid, passed merely a life estate to the several devisees therein named, with remainder in fee to the heirs at law of said testator as aforesaid.

LIZZIE C. MANOGUE,
Party Defendant.

A. A. HOEHLING, JR.,
Solicitor for said Defendant.

Verification waived:
HALLAM & HALLAM,
Sol'rs for Pl'ffs.

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, personally appeared Lizzie C. Manogue, who being by me first duly sworn, on oath, says: That she has read the foregoing answer by her subscribed, and knows the contents thereof; that the several matters and things therein stated of her own knowledge are true; and those stated upon information and belief, she believes to be true.

LIZZIE C. MANOGUE.

11 Subscribed and sworn to before me this — day of ——, A. D. 1902.

——.

Answer of George W. Manogue.

Filed January 27, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. MCCAFFREY ET AL., Complainants, *vs.* GEORGE W. MANOGUE ET AL., Defendants. } Equity. No. 23390.

Comes now the above-named George W. Monogue, party defendant herein, and, for separate answer to the bill of complaint herein

and to so much and such parts thereof, as he is advised it is necessary to be by him answered, says:

1, 2, 3, 4 and 5. He admits the averments contained in the first, second, third, fourth and fifth paragraphs of said bill, except that, for greater certainty, he insists that there be filed herein a duly authenticated copy of the last will and testament of Hugh McCaffrey, deceased, instead of the unauthenticated copy thereof which is purported to be set forth in said paragraph four.

6. He admits the death, testate, of the said Francis T. McCaffrey, as in said paragraph six alleged; but, for greater certainty, he insists that, so far as the same may be, or hereafter become, material or important herein, a duly authenticated copy of the last will and testament of said Francis T. McCaffrey, deceased, be filed herein, instead of the unauthenticated copy thereof which is purported to be set forth in said paragraph.

He admits, that according to the terms of the said last will and testament of said Francis T. McCaffrey, deceased, it was evidently his purpose and intention to pass, to the devisees therein named, as tenants in common, an estate in fee simple in and to the property by him therein and thereby devised, but he is advised, and, therefore, so avers, that, in law, no greater estate or interest therein was or could be by him devised than he possessed.

He also admits that question has heretofore arisen, and still exists, as to the extent of the estate and interest devised by the terms and provisions of the last will and testament of the said Hugh McCaffrey, deceased, to the several devisees therein named; that is to say, whether an estate in fee simple absolute passed to any or either of said several devisees, or merely a life estate, with remainder in fee to the heirs at law of him, the said Hugh McCaffrey, as will more fully appear by reference to the proceedings heretofore had in a certain other cause in this court, in equity No. 22,346, now remaining of record in this court, wherein the complainants herein were complainants, and Lizzie C. Manogue, party defendant herein, was defendant.

12 This defendant can neither admit nor deny the other averments in said paragraph contained, in respect of the extent of the title, interest and estate devised by the said testator, Hugh McCaffrey, to the several devisees named in his said will, or to any or either of them; nor whether upon the true construction of said will, the several devises therein contained were in fee simple, or merely passed a life estate, with remainder in fee to the heirs at law of said testator.

Wherefore, the premises considered, this defendant submits his rights and interests to the proper protection of the court, and prays, that such decree be entered herein, as may be appropriate and necessary to affirmatively establish, declare and settle the extent of the

title, interest and estate passed by the several and respective devises in said will contained.

GEORGE W. MANOGUE,
Party Defendant.

A. A. HOEHLING, JR.,
Solicitor for said Defendant.

Verification waived:
HALLAM & HALLAM,
Sol'rs for Pl'ffs.

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, personally appeared George W. Manogue, who being by me first duly sworn, on oath says: That he has read the foregoing answer by him subscribed, and knows the contents thereof; that the several matters and things therein set forth and stated of his own knowledge are true, and those stated upon information and belief, he believes to be true.

—— ——.

Subscribed and sworn to, before me, this — day of —— A. D. 1902.

—— ——

Replication.

Filed February 5, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } In Equity. No. 23390.

The plaintiffs hereby join issue on the answers of the defendants heretofore filed in this cause.

BIRNEY & WOODARD,
HALLAM & HALLAM,
Solicitors for Plaintiffs.

13 *Decree pro Confesso.*

Filed February 5, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } In Equity. No. 23390.

The defendants Catherine L. Quigley, Edward Quigley, and Margaret Quigley, having been duly summoned to appear and answer the bill of complaint, and having failed to do so,

It is this 5th day of February, A. D. 1903, adjudged, ordered and decreed that the bill of complaint be taken *pro confesso* as to said defendants Catherine L. Quigley, Edward Quigley and Margaret Quigley.

ASHLEY M. GOULD, *Justice.*

Offers of Evidence on Behalf of Manogue.

Filed March 23, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY
vs.
LIZZIE MANOGUE ET AL. } In Equity. No. —.

WASHINGTON, D. C., *March 21st*, 1903—12 o'clock m.

Met pursuant to notice at the office of Padgett & Forrest, Stewart building, corner Sixth and D streets, northwest.

Present: Mr. Hallam of counsel for the complainant; Mr. A. A. Hoehling, Jr., and Mr. Edwin Forrest, solicitors for the defendants Manogue, and Oscar Luckett guardian *ad litem* for the infant Frank Foley, and Edward Quigely, guardian *ad litem* for the infants Mary and Joseph Quigley.

Mr. FORREST: On behalf of the defendants Manogue we here offer in evidence true and certified copies under the hand and seal of the supreme court of the District of Columbia, holding a probate court, by its deputy register of wills for the District of Columbia of the following papers and records in the office of the said supreme court in the matter of the estate of Hugh McCaffrey, deceased, No. 7709 on the docket of said court, administration docket 23.

First. The decree of March 11, 1898, admitting to probate and record as a will of personal property the last will and testament of the late Hugh McCaffrey, dated April 30th, 1896, and granting letters testamentary thereon to the executors named in said will.

14 Second. The first and final account of Edwin Forrest and Orrin B. Hallam, collectors of the estate of Hugh McCaffrey, deceased, approved and passed by the court on February 16, 1901.

Third. First and final account of John E. Herrell and Patrick Maloney, executors of the will of Hugh McCaffrey, deceased, approved and passed by the court under date of the 4th day of March, 1902.

We have no further evidence to offer.

JNO. E. McNALLEY, *Examiner.*

I, John E. McNalley, an examiner in chancery, do hereby certify that the foregoing and annexed proceedings took place before me at the time and place named in the caption hereof, I further certify that I am not of counsel for either party and have no interest in the subject of this suit.

That my fee for taking said session is $5, which has been paid by the defendant Lizzie Manogue.

JNO. E. McNALLEY,
Examiner-in-chancery.

Filed March 23, 1903.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of HUGH MCCAFFREY.

Upon consideration of the certificate of the clerk of the supreme court of the District of Columbia, filed herein as to the verdict of the jury upon the several issues heretofore sent to the special term of the circuit court, and upon motion of counsel for John E. Herrell and Patrick Maloney the caveatees;

It is this 11″ day of March, 1898, adjudged, ordered and decreed that the paper writing filed in this court on the 12th day of March, 1897, dated the 30th day of April, 1896, purporting to be the last will and testament of Hugh McCaffrey, deceased, be and the same is hereby admitted to probate and record as a will of personal property and that letters testamentary issue to said John E. Herrell and Patrick Maloney as executors of said last will and testament upon their giving bond with sureties approved by the court in the sum of nine thousand dollars.

A. B. HAGNER,
Asso. Justice.

From this order the caveators, Lizzie Manogue and James B. McCaffrey, appeal in open court to the Court of Appeals of the District of Columbia and request the court to fix the amount of the supersedeas bond, which the court orders be in the penalty of three hundred dollars.

A. B. HAGNER,
Asso. Justice.

M'ch 11/98.

15 No. 7709, adm'n doc. 23.

Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

First and Final Account of Edwin Forrest and Orrin B. Hallam, Collectors of the Estate of Hugh McCaffrey, Deceased.

Letters issued April 13, 1897.

These accountants charge themselves with the following, to wit:

Amount collected from German American Building Association	1040.	
Cash from bank	672.75	
" " Metropolis Building Association	2120.	

They claim credit for the following, to wit:

1897.				
June 17.	By paid Northwestern Nat. Ins. Co...	Vou. 1..	.....	1.
July 23.	By paid George P. Zurhorst, funeral expenses	" 2..	.....	170.
1898.				
M'ch 31.	" " John McLaughlin, carriages for funeral	" 3..	.....	36.
June 17.	" " Northwestern Nat. Ins. Co.	" 4..	.....	1.
Aug. 1.	" " register of wills, court costs...	" 5..	.....	18.86
1899.				
Feb'y 1.	" " executors of Mary A. Quigley, dec'd, per order of court of Jan'y 31, 1899	" 6..	.....	581.
1901.				
Feb'y 1.	" " Orrin B. Hallam, attorney's fee and printing expenses, per order of court of Jan'y 31, 1901	" 7..	.....	505.60
	By paid register of wills, this account.	Vou. 8..	.....	9.75
	" " commission on $3832.75 (a) 3%	.....	.....	114.98
				1438.19
	Balance	.....	.....	2394.56
			$3832.75	$3832.75
	Balance down		$2394.56	

Distributable as follows, to wit:

To John E. Herrell and Patrick Maloney, executors of Hugh McCaffrey, deceased		2394.56
	$2394.56	$2394.56

EDWIN FORREST,
ORRIN B. HALLAM,
Collectors.

DISTRICT OF COLUMBIA, *To wit:*

OFFICE OF THE REGISTER OF WILLS,
February 16th, 1901.

This day appeared Edwin Forrest and Orrin B. Hallam collectors of the estate of Hugh McCaffrey, deceased as aforesaid, and made oath on the Holy Evangels of Almighty God that the foregoing account, as stated is just and true, that they have *bona fide* paid, or secured to be paid, the several sums for which they claim credit and allowance.

Test:

LOUIS A. DENT,
Register of Wills for the District of Columbia.

16 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

On this 16th day of February, A. D. 1901, the foregoing account being now presented for approval, the same is after examination by the court approved and passed.

CHAS. C. COLE, *Justice.*

upreme Court of the District of Columbia, Holding a Probate Court.

Estate of HUGH MCCAFFREY, Deceased. No. 7709, Administration.

First and Final Account of John E. Herrell and Patrick Maloney, Executors of the Will of Hugh McCaffrey, Deceased.

				Disbursements.	Receipts.
	These accountants charge themselves with the following to wit:				
	Cash received of Edwin Forrest and Orrin B. Hallam, collectors				$2,394 56
	Net proceeds of sale of household furniture				25 11
					$2,419 67
1901.	They claim credit for the following to wit:				
M'ch 5	By paid Jno. McLaughlin	Vou.	1	$17 40	
" 5	" " W. W. Powers	"	2	6 80	
" "	" " W. P. C. Hazen, M. D	"	3	30 00	
" "	" " Frank Pitzer	"	4	2 60	
" "	" " Marie Mills	"	5	16 00	
" 14	" " appraisers	"	6	12 00	
Oct. 22	" " O. B. Hallam	"	7	5 50	
Oct. 23	" " register of wills, court costs	"	8	24 10	
	" commission on $2,419.67 (a) 10 %			241 97	
	" paid register of wills, accrued costs & this account	"	9	12 36	
				368 73	
	Balance			2,050 94	
				$2,419 67	$2,419 67
	Balance down				$2,050 94
	Distributable in accordance with the will of testator, as follows to wit:				
	To Mary A. Quigley, deceased all		$2,050.94	$2,050 94	
1901.	Less advances as follows				
M'ch 5	Per receipt	$1,000.00			
June 20	" "	250.00			
	Forward	$1,250.00	$2,050.94	$2,050 94	$2,050 94
(2d page)					
1901.	Brought forward	$1,250.00	$2,050.94	$2,050 94	$2,050 94
Nov. 21	Per receipt	100.00			
		$1,350.00	1,350.00		
	Bal. due estate of Mary A. Quigley deceased		700.94		
				$2,050 94	$2,050 94

17 DISTRICT OF COLUMBIA, *To wit:*

We, John E. Herrell and Patrick Maloney, executors of the will of Hugh McCaffrey late of the District of Columbia deceased, do solemnly swear that the foregoing account is just and true, and that we have *bona fide* paid, or secured to be paid, the several sums for which we claim credit and allowance.

JOHN E. HERRELL.
PATRICK MALONEY.

Sworn to and subscribed before me this 3rd day of March, A. D. 1902.

LOUIS A. DENT,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

In the Supreme Court of the District of Columbia, Holding a Probate Court.

On this 4th day of March, A. D. 1902, the foregoing account, being now presented for approval, the same is, after examination by the court, approved and passed.

JOB BARNARD, *Justice.*

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, John R. Rouzer, deputy register of wills for the District of Columbia, clerk of the probate court, do hereby certify, that the foregoing are true copies of the original order of court admitting will to probate and record as to personalty, first and final account of collectors and first and final account of executors, filed and recorded in the office of the register of wills for the District of Columbia, clerk of the probate court, in the matter of the estate of Hugh McCaffrey, deceased. Case No. 7709, adm. docket 23.

I further certify, that I have compared said copies with the original records in said office, and find them to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said probate court, this 21st day of March, A. D. 1903.

JOHN R. ROUZER,
[SEAL.] *Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.*

18 *Testimony for Complainants.*

Filed March 25, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } Equity. No. 23390.

Be it remembered that at an examination of witnesses begun and held pursuant to notice on the 20th day of February, 1903, at which said examination there were present Orrin B. Hallam, Esq., of solicitors for the complainants, Edwin Forrest and Adolph A. Hoehling, Esqrs., solicitors for the defendants, and Messrs. Edward Quigley and Oscar Luckett, guardians *ad litem* for the infant defendants, personally appeared before me, J. Arthur Lynham, an examiner in chancery of said court, the within named witness-, who being called for and on behalf of the complainants, and being by me first duly sworn to testify the truth, the whole truth and nothing but the truth touching the matters at issue in the above entitled cause, did depose and say what is hereinafter set out as stated by him.

J. ARTHUR LYNHAM, *Examiner.*

In the Supreme Court of the District of Columbia.

WILLIAM H. McCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } Equity. No. 23390.

WASHINGTON, D. C., *February* 20, 1903,
Friday, at 2 o'clock p. m.

Met, pursuant to notice, to take testimony on the part of the complainants in the above entitled cause.

Present: Orrin B. Hallam, Esq., of solicitors for the complainants, Edwin Forrest, and Adolph A. Hoehling, Esqrs., solicitors for certain defendants, and Messrs. Edward Quigley, guardian *ad litem* of Mary and Joseph Quigley, and Oscar Luckett guardian *ad litem* of the infant Frank Foley.

Mr. HALLAM: The plaintiffs submit a certified copy of the will and probate of Hugh McCaffrey in evidence; also a certified copy of the will of Frank T. McCaffrey. This certificate is also offered in evidence.

NOTE.—And the same are filed by the examiner, marked Complainants' Exhibits No. 1, 2 and 3.

Mr. HOEHLING: Is it the certificate of the assessor of taxes?

Mr. HALLAM: Yes.

19 Mr. HOEHLING: What is the purpose of it?

Mr. HALLAM: For the purpose of showing the real estate that Hugh McCaffrey owned at the time of his death.

Mr. HOEHLING: Well, if you put it that way I will have to object to it. If you say for the purpose of showing the property that was assessed in his name on the books of the tax collector, I won't object.

Mr. HALLAM: No; let it go that way.

Mr. HOEHLING: The certified copy of the will of Hugh McCaffrey, together with the certificate, is objected to in the form in which it now is, because the record is evidently incomplete, not containing a record of the admission of said will to probate as a will of personalty. The certificate of the assessor of taxes is objected to, in so far as it is offered for the purpose of showing the property owned by Hugh McCaffrey during the years embraced in said certificate. I have no objection to the certificate, or to the form of proof covering the fact that the properties claimed in it were assessed to Hugh McCaffrey during the years stated in the certificate.

Mr. HALLAM: Well, you have no objection to the statement that that was all that was assessed to him?

Mr. HOEHLING: No.

Thereupon ORRIN B. HALLAM, being first duly sworn, testified as follows:

Sometime in March, 1897, I was requested to act on behalf of the executors of the will of Hugh McCaffrey in the matter of the probate of the will. A petition was filed and later, on account of a contest being made against the will, Mr. Edwin Forrest and myself were appointed collectors of the estate. Acting under what we conceived to be our authority, we took possession of all the real estate, with the exception of the two houses, one occupied by Frank McCaffrey at Sixth and East Capitol streets, and the other occupied by Mrs. Quigley at Eleventh and C streets, southeast. All the real estate that came to our knowledge after inquiry among the persons interested in the estate were the houses mentioned in the will of the testator. We also made inquiry as to personalty, and could find nothing except some $657.00 in bank, and some stock in two building associations, and some household furniture, and the amount of $100 which was said to be in his safe at the time of his death, and which Frank McCaffrey took possession of.

Speaking for myself, and to a large extent that matter was left to me by my colleague or co-collector, Mr. Forrest, I made every inquiry to ascertain whether there was any other estate of any kind, but could find none. We took possession of the building association money and the money in bank, and made a request of Frank McCaffrey to turn over the $100 that he had taken out of the safe. He did furnish to the executors $20 for the purpose of filing the petition for letters, and later claimed, when called on for the remaining $80., that he had expended it.

I should add that there is mention of a watch and chain
20 bequeathed to Joseph Quigley. In relation to that Frank McCaffrey set up a claim that it had been given to him by his father after the date of the will, and we were unable to get possession of it, it being stated by him that he had placed it in pawn somewhere, and that he claimed the absolute right to it.

There was also mentioned a horse and buggy as a bequest to Frank McCaffrey, but he, for some reason, or other declined to surrender that, and, in some way or other, made disposition of it later. The household furniture, after the will was finally admitted to probate, the executors got possession of from Mrs. Manogue, who had continued to occupy the property after Frank McCaffrey's death, and it was sold at auction. So far as it was turned over, it was very insignificant, not amounting, perhaps, to more than some $25. or $50.

The persons named in the will of Hugh McCaffrey were his sole heirs at law. Mrs. Quigley died a few months later, about the 10th of July 1897, and she left, as her sole heirs, four children, Catherine L., Margaret, Joseph and Mary. They were all then under twenty-one years, but since that date the two older children, Catherine L. and Margaret have become of age.

Mrs. Quigley left a will which is set forth I believe in the bill in this case, whereby she left, in substance, the control of all her property in her husband, Edward Quigley, and her oldest daughter, Catherine L. Quigley, until the youngest child comes of age. I understand that there is no controversy about that being her will, and I simply mention that for the purpose of showing, so far as it may be necessary to show, the interest of her children and husband.

Cross-examination.

By Mr. FORREST:

Q. Do you recall the value of the building association stock?

A. I can recall in a general way that there was in one association—I have forgotten its particular name—about $2140, and in the *only* other about $1120. There was about $675 in the bank.

Q. Do you remember the total value of the personal property that came into our hands as collectors, independently of our return and accounting to the executors under the will?

A. Yes, I remember it very distinctly, because I had occasion to look at it. I am quite sure that those three items were the only ones, the two building association shares and the money in bank.

Q. The total of the personal property, then, that came into our hands as collectors, amounted to nearly $4000.

A. Practically so, yes, $3800 or $4000.

Q. Subsequent to the qualification of yourself and myself as collectors, and during our administration as such, do you recall what debts, if any, we paid out of the personal property coming into our hands as collectors?

A. I can only state that from recollection, in a general way
21 We did pay, by authority of the court, the funeral bill. We also made some advances to Mrs. Quigley. There was also deducted a payment to myself, I believe, as attorney for the executors, or for Mrs. Quigley in the matter of the contest of the will, and, in one way or another when the time came to make the payment over to the executors and the settling of our account as collectors, there was about $2100 turned over. There may possibly have been a few other bills besides the funeral expenses that were authorized to be paid, but I do not recall them just now. The account of the collectors and the receipt of the executor will show those things much more accurately than I could at this time, but I am quite certain in a general way that what I have stated is about correct.

Q. You have, I believe, given the date of the appointment of yourself and myself as collectors. Do you now recall how long we served as such, before our account was settled and we accounted to the executors under the will?

A. I could only state in a general way that it was about four years.

Q. So far as you know, and as counsel for the executors under the will, and with your knowledge of the condition of the estate of Hugh McCaffrey, what debts, if any, were due by the estate at the time that the collectors turned the property over to the executors, and what disposition in the way of payment of any of those debts was made subsequent to that time, if any, existed at that time?

A. There were a few small bills. Speaking from recollection, and I am sure that it is reasonably accurate, they could not have amounted to more than $100. The collectors had not been authorized to pay any debts of the deceased, except those that related to his funeral expenses. These other small debts amounting to $100 or less, were paid, to my knowledge, by the executors.

Q. And such payments were made out of the personal estate of the deceased, Hugh McCaffrey?

A. Unquestionably so, and after those payments were made, the residue, whatever it was, was turned over to the executors of Mrs. Quigley.

Q. Well, there was a residue of personal estate after the payment of the debts?

A. Unquestionably so.

Q. You testified, I believe in your direct examination that there was first a contest over the will, which was decided in favor of the caveatees, and the will was admitted to probate as to personalty; that is right, isn't it?

A. I don't remember that I testified to that, but that is a fact.

Q. Now, do you recall whether it was after the will contest was decided in that way that we accounted to the executors as collectors, or was it after the will was admitted to probate as to real estate?

A. I will not be certain about that, but my recollection is that the accounting was not made until after the will was admitted to record as a will of real estate. It possibly may have been. It seems to me that there was raised in some way some question about
22 our duty to account to the orphans' court as collectors of the real estate as well as the personalty, and in one way or another, the settlement was not made until after the will had been admitted to record as a will of real estate, but as I have before stated, I think we came to the conclusion that while we had acted under our presumed authority as collectors to take charge of the realty, that that was really not a matter that the orphans' court had jurisdiction of, and that therefore we made an accounting to the orphans' court simply as to the personalty, and settled with the respective heirs or devisees under the will of Hugh McCaffrey for the rents that we had collected from the real estate. I am sure that we made the settlement of the rents directly with the devisees, and not with the orphans' court.

ORRIN B. HALLAM.

Subscribed and sworn to before me this 21st day of February, A. D. 1903.

J. ARTHUR LYNHAM, *Examiner.*

The taking of testimony on the part of the complainants is here announced as closed.)

I certify that the foregoing deposition, (comprising 9 typewritten pages) was taken down by me in shorthand, as an examiner in chancery, from the statements when and as uttered by the deponent thereof; that the same was thereafter transcribed and reduced by me into print, and thereupon read and subscribed by the said deponent in my presence.

I further certify that my fee of $5.00 for taking, certifying and returning said depositions has been paid to me by the complainants.

And I further certify that I am not of counsel, nor in anywise interested in this cause.

J. ARTHUR LYNHAM, *Examiner.*

Memoranda.

For Complainant Exhibit No. 1, see page No. 2 of bill.
For Complainant Exhibit No. 2, see page No. 5 of bill.

COMPLAINANT EXHIBIT No. 3.

Filed March 25, 1903.

Certificate of Assessment.

OFFICE OF THE ASSESSOR,
DISTRICT OF COLUMBIA,
WASHINGTON, *February* 20, 1903.

This is to certify that real estate described as follows square 208, sub lot 54; square 841, parts of sub lots 19 and 20; square 868, part of lot 10; square 968, part of lot 14; square 970, part of
23 lot 5, assessed on the books of this office was the only real estate in the name of Hugh McCaffrey, during the fiscal years of 1896 and 1897.

[SEAL.]

H. H. DARNEILLE,
Assessor, D. C.

A. C. K.

S. T. K.

Final Decree.

Filed April 8, 1903.

In the Supreme Court of the District of Columbia, April 8, 1903.

WILLIAM H. MCCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } In Equity. No. 23390.

This cause came on to be heard at March term 1903, of the court, upon the pleadings, testimony, and all proceedings had herein, and was argued by counsel; (and it appearing to the court that under the last will and testament of Hugh McCaffrey, deceased, bearing date April 30, A. D. 1896, and duly admitted to probate and record, as a will of both realty and personalty, in this court holding a special term as a probate court, the several devisees therein named took and acquired each only an estate for his or her life respectively in the several and respective pieces and parcels of real estate therein devised, and not an estate in fee simple, and that neither of said devises was enlarged from such life-estate to a fee simple by reason of anything in said will contained, or by reason of any charge made or duty imposed, in and by the terms thereof, upon Mary A. Quigley, one of the devisees therein named, as contended in the bill of complaint herein;) thereupon, upon consideration thereof, it is, by the court, adjudged, ordered and decreed:

1. That, under said last will and testament, the late Francis T. McCaffrey, one of the devisees therein named, took and acquired only an estate for his life in the certain property therein given and bequeathed to him, to-wit: house No. 519 East Capitol street, and the lot on which it stands, the same being a part of lot numbered twenty (20), in square numbered eight hundred and forty-one (841) in the District of Columbia; and,

2. That, under said last will and testament, the complainant William H. McCaffrey, being another of the devisees therein named, took and acquired only an estate for his life in the certain property therein given and bequeathed to him, to-wit: house No. 604 East Capitol street, and the lot on which it stands, being part of lot numbered ten (10) in square numbered eight hundred and sixty-eight (868), in the District aforesaid.

And it is, thereupon, further, adjudged, ordered and decreed, that each party *to* pay his or her costs to this time, to be taxed by the clerk, and to be hereafter apportioned by the court among the several parties to this suit.

A. B. HAGNER,
Asso. Justice.

24 *Motion to Amend Decree, &c.*

Filed April 23, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. MCCAFFREY ET AL., Plaintiffs,
vs.
LIZZIE C. MANOGUE ET AL., Defendants.
} In Equity. No. 23390.

And now come the defendants Edward Quigley, Catherine L. Quigley, Margaret Quigley, Joseph Quigley and Mary Quigley, the last two by their guardian *ad litem*, Edward Quigley, and move the court to amend its decree herein by striking out therefrom the recital to the effect that it appeared to the court that none of the devisees took under the will any more than a life estate. This motion being based on the grounds following, to wit:

1. That it is contrary to the rules of the court to embrace any such recital in its decree.

2. That the bill did not ask any decree except as to the property devised to Frank McCaffrey and William H. McCaffrey; and the court had no jurisdiction in this cause to determine by recital or otherwise the title to any property except that described in the bill.

3. That the devises to Frank and William H. McCaffrey stood upon a different and secondary basis from that to Mrs. Quigley, and that no question was raised in this suit as to her right to her property as in fee simple.

HALLAM & HALLAM,
Solicitors for said Quigleys.

To Messrs. Edwin Forrest and A. A. Hoehling, attorneys for Lizzie C. and George Manogue; Mr. Oscar Luckett, guardian *ad litem* for Frank Foley:

Take notice that the above motion will on Friday, April 24, 1903, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, be called up in equity court No. 1 Justice Hagner, presiding.

HALLAM & HALLAM,
Solicitors for said Quigleys.

Service accepted by receipt of copy, April 21, 1903.

EDWIN FORREST,
Of Counsel for Manogues.
OSCAR LUCKETT,
Guardian ad Litem for Frank Foley.

April 21, 1903.

25 *Order Overruling Motion.*

Filed April 24, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. MCCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } In Equity. No. 23390.

This cause coming on to be heard upon motion filed herein on April 22d. 1903, to amend the decree made in this cause by striking therefrom the parts thereof recited in said motion, and the same having been duly considered by the court, it is this 24" day of April, 1903 ordered that said motion be and the same hereby is overruled.

A. B. HAGNER,
Asso. Justice.

Order for Appeal.

Filed April 24, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM H. MCCAFFREY ET AL.
vs.
LIZZIE C. MANOGUE ET AL. } In Equity. No. 23390.

And now come the plaintiffs William H. McCaffrey and James B. McCaffrey and the defendants Edward Quigley, Catherine L. Quigley, Margaret Quigley, Joseph Quigley and Mary Quigley, the

last two by their guardian *ad litem*, Edward Quigley, and note an appeal in open court from the decree rendered April 8, 1903 and it is ordered that the bond on appeal be fixed at $100 or a deposit of *of* $50 in lieu thereof. This 24th day of April 1903.

A. B. HAGNER, *Justice.*

Memorandum.

May 1, 1903.—Appeal bond filed.

26 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 46, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 23,390, equity, wherein William H. McCaffrey *et al.* are complainants, and Lizzie C. Manogue *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 11th day of May, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1318. William H. McCaffrey *et al.*, appellants, *vs.* Lizzie C. Manogue *et al.* Court of Appeals, District of Columbia. Filed May 11, 1903. Robert Willett, clerk.

27 THURSDAY, *June 4th, A. D.* 1903.

WILLIAM H. MCCAFFREY, JAMES B. MCCAFFREY, Edward Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, Their Guardian *ad Litem*, Appellants,
vs.
LIZZIE C. MANOGUE, GEORGE W. MANOGUE, and FRANK Foley,
} No. 1318.

The argument in the above entitled cause was commenced by Mr. O. B. Hallam attorney for the appellants.

FRIDAY, *June 5th, A. D.* 1903.

WILLIAM H. McCAFFREY, JAMES B. McCAFFREY, Edward Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, Their Guardian *ad Litem*, Appellants,
vs.
LIZZIE C. MANOGUE, GEORGE W. MANOGUE, and FRANK Foley.
} No. 1318.

The argument in the above entitled cause was continued by Mr. O. B. Hallam attorney for the appellants, and was submitted to the consideration of the court on the printed record and briefs filed herein by Messrs. Edwin Forrest and A. A. Hoehling Jr., attorneys for the appellees.

28 WILLIAM H. McCAFFREY, JAMES B. McCAFFREY, Edward Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, Their Guardian *ad Litem*, Appellants,
vs.
LIZZIE C. MANOGUE, GEORGE W. MANOGUE, and FRANK Foley.
} No. 1318.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

The bill was filed by William H. and James B. McCaffrey to obtain a construction of the will of Hugh McCaffrey, deceased. Among the complainants and defendants are included all the heirs at law of said Hugh McCaffrey, as well as certain persons claiming under one or more of them through devise and purchase.

The will is in the following words:

"WASHINGTON, DISTRICT OF COLUMBIA,
April Thirtieth, 1896.

In the name of God, being now in good health and sound in mind and body I hereby certify and declare this to be my last will and testament, hereby annulling and revoking any and all wills previously made.

I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5, square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square number 841, also any money in

bank to my account at the time of my death, also any money
29 due to me, also any building association stock. She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetrey.

I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight (868).

To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

2. To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, being part of lot number twenty (20) in square eight hundred and forty-one (841), also my horse and buggy.

And to my grandson, Frank Foley, I give and bequeath house number one hundred and twenty-one (121) Eleventh street S. E., being in lot number fourteen (14), square number nine hundred and sixty-eight (968), and lot on which it stands.

To my grandson Joseph Quigley, I give and bequeath my watch and chain.

I hereby name and appoint as executors of this my last will and testament, John E. Herrell and Patrick Maloney.

All the real estate herein described is located in the city of Washington, District of Columbia.

HUGH McCAFFREY. [SEAL.]"

The lands described in the said will were all owned in fee simple by the testator at the date thereof and at his decease.

The will was admitted to probate after a contest by some of the heirs at law, and the final report of the executors thereof shows that after the payment of all debts, and expenses of administration and litigation, there remained a balance of $2,050.94 from the proceeds of the personal estate, which was paid over to the legatee, Mary A. Quigley.

Frank T. McCaffrey, one of the devisees of Hugh McCaffrey, died October 28, 1898, without issue, and leaving a will in which he devised all of his estate to his sister, Lizzie C. Manogue, and his brothers, the complainants, to hold as tenants in common in fee simple.

James B. McCaffrey conveyed to the defendant, George W. Manogue, the lot devised to him by Hugh McCaffrey, together with all other interest in the estate of the testator. At the time of the death of Francis T. McCaffrey he was in possession of the premises, part of lot 20 in square 841, devised to him by Hugh McCaffrey,

claiming to own and hold the same in fee simple. The aforenamed devisees of Francis T. McCaffrey obtained a decree for the sale of the said premises, for partition among them. A sale was made by trustees to one Little, who refused to complete the same on the ground that the title was defective in that Francis T. McCaffrey took only a life estate under the will of Hugh McCaffrey. A proceeding was begun to compel performance, which was denied on the ground that the purchaser ought not to be compelled to take a doubtful title. McCaffrey *v.* Little, 20 App. D. C. 116.

The question of title was not decided in that case, because the majority of the parties interested in the question generally as devisees in said will were not parties to the proceeding.

This bill to obtain construction and quiet title is the sequel of that proceeding.

The contention of the complainants is that each of the devisees in the will of Hugh McCaffrey, under a proper construction of that will, took an estate in fee simple.

Upon the hearing in the court below the presiding justice was of the opinion that the several devisees in the will of Hugh McCaffrey "took and acquired each only an estate for his or her life respectively in the several and respective pieces and parcels of real estate therein devised, and not an estate in fee simple, and that neither of said devises was enlarged from such life estate to a fee simple by reason of anything in said will contained, or by reason of any charge made, or duty imposed, in and by the terms thereof, upon Mary A. Quigley, one of the devisees therein named."

From a final decree in accordance with this conclusion the complainants have taken this appeal.

It is a well-settled rule of law that a simple devise of land in this District, without words of limitation or description of the extent of the interest devised, creates a life estate only. And this rule of law can not be made to yield to the rule of construction founded on the disfavor with which partial intestacy is regarded. McAleer *vs.* Schneider, 2 App. D. C. 461, 467. "At the same time," as was said in that case, "to enlarge the estate into a fee does not require the use of technical terms or any particular form of words. Any words which will sufficiently show the intention of the testator to create more than a life estate will be given that effect, no matter what their form may be, and the whole will may be looked into in order to ascertain the meaning to be given to this particular part."

Six separate devises are contained in the will of Hugh McCaffrey, and in no one of them are there words either indicating in themselves an intention of the testator, or forming room for a construction that would prevent the operation of the positive rule of law above stated, unless they may be found in the first item in which a bequest of personal property to Mary A. Quigley follows the devise of a part of the real estate.

These words are contained in the last sentence of the item for her benefit, which reads as follows: "She is to pay funeral expenses

and any other legal debts I may owe; also to care for my lot in Mount Olivet cemetery."

It is contended that these words, by operation of another established rule of construction, not only enlarge the previous devise to Mary A. Quigley, but also each subsequent uncharged devise into a fee simple estate.

That rule is, that where a devise of lands without words of limitation or description of the extent of the estate to be taken is coupled with a personal charge upon the devisee, in effect a condition of the devise, the operation of such a charge is to enlarge the life estate that would otherwise pass into a fee simple.

As thus stated, the rule has been generally recognized since its enouncement in Collier's case, 37 Eliz. 6 Coke, 16. It is enough for us to say that it has the sanction of the Supreme Court of the United States. Wright *v.* Page, 10 Wheat. 203, 231; Abbott *v.* Essex Co., 18 How. 202, 215.

30 The difficulty which we encounter in this case is not in the ascertainment of the rule, but in its application to the language of the inartificial will that is the subject of construction. Owing to the very nature of wills, and the fact that they are largely drawn by unskilled persons, it is difficult also to find a decided case applying a well-known rule of construction to the particular language of one will that will furnish a certain and complete guide for the interpretation of another. The decisions which have been urged on behalf of the appellant- as controlling do not furnish us such a guide. In Abbott *v.* Essex Co., *supra*, the devise construed read thus:

"*Item.* I give to my two sons, namely John and Jacob Kittredge, all my lands and buildings in Andover aforesaid, excepting the land I give to my son Thomas aforesaid, which buildings consist of dwelling houses, barns, corn house, grist mill, and cider mill, all of every denomination; also all my live stock of cattle, horses, sheep, and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may leave at my decease; and my wearing apparel, I give the same to my sons John and Jacob Kittredge, to be equally divided between them; and in consideration of what I have given my said sons John and Jacob Kittredge, the executor of this testament, hereinafter named, is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given to my two sons John and Jacob Kittredge, to whom I give each one bed and bedding.

"*Item.* It is my will, that if either of my said sons, namely John and Jacob Kittredge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs."

The substantial differences between that devise and the one under consideration here can not be better illustrated than by quoting the

language of Mr. Justice Grier in giving construction to it, in which appears, also, the statement of the rule before mentioned:

"There are no words of inheritance in this first clause of the devise to John and Jacob; but such words are not absolutely necessary in a will to the gift of a fee. The subject of this devise is described as 'that part of my estate.' The word 'estate,' or 'that part of my estate,' has always been construed to describe not only the land devised but the whole interest of the testator in the subject of the devise; thus, a devise of 'my estate consisting of thirty acres of land, situate, etc.,' will carry a fee. Moreover, the legacy given for the maintenance of Sarah Devinny, 'to be paid out of that part of my estate given to John and Jacob,' would be defeated by their death before she arrived at the age of 18, if the devise to them was a life estate only. The intention of a testator must be drawn from the whole context of his will. And it is not necessary to look alone at the words of the gift itself to ascertain the intention of the testator as to the *quantum* of the estate devised, if it can be gathered from expressions used in any part of it, what he supposed or intended to be the nature and extent of it. It will not admit of a doubt, also, that the testator intended that both of his sons should have the same estate in the devised premises which were 'to be equally divided between them.' John is charged personally, in respect of the estate given him, with the payment of all the debts and legacies. The testator calls it the 'consideration' to be paid for that part of his estate given to his two sons, and though John was appointed executor, whose duty it became, as such, to see to the payment of the debts and legacies, the charges are to be paid by him at all events out of the estate devised to him and Jacob, and not out of the rents and profits only. By their acceptance of the devise they became personally liable. In such cases it is well settled that the devisee takes a fee, without words of inheritance."

It is unnecessary to refer to the second item above quoted as also illustrating the general intention of the testator.

In the case at bar the devise is first to Mary A. Quigley of specific parcels of land, followed immediately by the bequest of money in bank, or due, and the building association stock, which, as we have seen, comprised substantially the whole of the personal estate of the testator. Then follows the separate sentence, quoted above, relating to her payment of his funeral expenses and legal debts. The part relating to care of cemetery lot may be dismissed as scarcely an enforceable trust or charge.

The bequest, as we have seen also, amounted to a considerable sum in excess of the funeral expenses and debts, including also the unanticipated expense attending a contest of the will.

This personalty was, of course, the primary fund for the discharge of these obligations, and there were no legacies charged upon the estate at all.

When we look to the remaining devises, five in number, we find that instead of aiding the construction as to be given item 1, they

seem to militate against it. They are simple devises of specific lands and nothing more, and the language to that extent is identical with the words of devise in item 1.

This being the case, the appellants have been compelled to contend, also, that these devisees took in fee, because the additional words in item 1 enlarged the life estate therein to a fee. This construction is the necessary incident of the first, or else we contemplate the testator as artfully giving the greater part of his estate to Mary A. Quigley in fee and leaving her free to claim an heir's portion in the remaining devises after the limitation of the estate for life.

On the other hand, would it not be more reasonable and just to infer that the testator, who certainly knew that a large surplus would remain of the personal estate given to Mary A. Quigley after discharging the small debts and funeral expenses directed to be paid by her, had no idea of subjecting her to a charge in respect of the previously devised real estate?

To reinforce their argument counsel advert to the rule of construction founded on the presumption against partial intestacy; but this, as we have seen, can not be made to override the positive rule of law that requires either express words of limitation or language reasonably indicating an intention to create more than a life estate.

Concede it to be probable that the unlearned testator supposed he was giving a fee in each devise by the terms used, yet that supposition can not be invoked to control the settled meaning of
31 his language. As was said by Mr. Justice Story in Wright *v.* Page (10 Wheat. 204, 228): "It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention, with reasonable certainty, on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape."

Upon the point that, if the first devise be enlarged by the charge imposed upon the devisee, the same enlargement must follow in all the subsequent devises, counsel rely strongly upon the case of Cook *v.* Holmes, 11 Mass. 528. In that case two parcels were devised to children conditioned upon their payment of certain charges, and the third to a grandson without condition; no words of inheritance were used. The effect of the charge in the first two was held to indicate an intention to give the fee, and it was also held that the grandson took in fee; but not because of the construction given to the first two.

An examination of the opinion shows that the court found numerous expressions in other parts of the will indicating the intention of the testator to devise the fee throughout; and reciting some of the other items, pointed out certain results that would follow a contrary construction, saying of one of these: "This would be an absurdity which ought not to be imputed to the testator."

Were it then conceded that the effect of the charge upon Mary A. Quigley was to enlarge the devise to her into a fee, we would be constrained to deny it operation as working the enlargement of the remaining devises. Giving it this limited effect would work the injustice of securing to her and her heirs a large part of the estate, and then letting her, or them, in to claim an equal share in the reversion upon the termination of the life estates of the remaining devisees. We cannot presume that this result was within the contemplation of the testator.

As we have before suggested, the testator died practically free from debt; he knew of what his personal property consisted when he gave it all, substantially, to Mary A. Quigley, in connection with an apparently excessive share of his landed property; and that a large surplus must necessarily remain to her after the discharge of all possible demands and expenses. Presumably, he knew that this personal property was first charged by law with the payment of debts and expenses. Having made the devise and bequest in one sentence, he then added the separate sentence: "She is to pay funeral expenses, and any other legal debts I may owe," etc.

Under all the surrounding circumstances, the practical effect of this clause would seem to be the same, substantially, as if he had expressly directed the payment to be made *out* of said personal estate, or had made the bequest of the same *after* the payment of funeral expenses and debts.

The following cases, while not directly in point, tend to support this conclusion. Moore *v.* Mellor, 2 Bosanquet & Fuller (H. L.), 247, 253; Jackson *v.* Harris, 8 Johnson, 141, 146.

Believing that the construction decreed by the learned justice who presided at the hearing comes nearer carrying out the intention of the testator than any other that is permitted by positive rules of law which we must follow, and comes nearer doing complete justice between all the parties at interest than any other that might be given, his decree will be affirmed. It is so ordered, and that the costs be taxed against all the parties in the proportion as their interests may appear, and that the cause be remanded to the court below that the costs may be apportioned in accordance with this decision. Affirmed.

32 THURSDAY, *June 25th, A. D.* 1903.

WILLIAM H. MCCAFFREY, JAMES B. MCCAFFREY, Edward Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, Their Guardian *ad Litem*, Appellants,
vs.
LIZZIE C. MANOGUE, GEORGE W. MANOGUE, and Frank Foley.
} No. 1318. April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause, be, and the same is hereby affirmed; costs to be taxed against all the parties in the proportion as their interest may appear; and that this cause be, and the same is hereby, remanded to the said supreme court that the costs may be apportioned in accordance with the opinion of this court.

Per MR. JUSTICE SHEPARD.

June 25, 1903.

33 In the Court of Appeals of the District of Columbia.

WILLIAM H. MCCAFFREY ET AL., Appellants,
vs.
LIZZIE C. MANOGUE ET AL., Appellees.
} No. 1318.

And now come the appellants, William H. McCaffrey, James B. McCaffrey, Edward Quigley, Catherine L. Quigley, Margaret Quigley, Joseph Quigley and Mary Quigley, the last two by their *guardian ad litem*, Edward Quigley, and pray an appeal from the decree of this court of June 25, 1903, to the Supreme Court of the United States.

O. B. HALLAM,
Of Counsel for Appellants.

On consideration of the above petition the appeal is granted and bond for costs fixed at $500.00.

R. H. ALVEY,
Chief Justice.

(Endorsed:) No. 1318. William H. McCaffrey, *et al.*, appellants *vs.* Lizzie C. Manogue, *et al.* Motion for appeal to S. C. U. S., Order allowing same and fixing amount of bond. Court of Appeals, District of Columbia. Filed Aug. 3, 1903. Robert Willett, clerk.

34 In the Court of Appeals of the District of Columbia.

WILLIAM H. McCAFFREY ET AL., Appellants,
vs.
LIZZIE C. MANOGUE ET AL., Appellees. } No. 1318.

It is hereby stipulated and agreed that the matter in dispute on appeal to the Supreme Court of the United States exceeds the sum of $5,000.00 exclusive of costs.

EDWIN FORREST,
A. A. HOEHLING, JR.,
Attorneys for Lizzie C. Manogue and George W. Manogue.
OSCAR LUCKETT,
Guardian ad Litem for Frank Foley.
O. B. HALLAM,
Of Counsel for Appellants.

(Endorsed:) No. 1318, William H. McCaffrey *et al. vs.* Lizzie C. Manogue *et al.* Stipulation as to amount in controversy. Court of Appeals, District of Columbia, Filed Aug. 3, 1903, Robert Willett, clerk.

35 Know all men by these presents, that we, William H. McCaffrey, James B. McCaffrey, Edward Quigley, Catherine L. Quigley, Margaret Quigley, Joseph Quigley and Mary Quigley, the last two by their guardian *ad litem*, Edward Quigley as principals, and Harry V. Lansdale, as surety, are held and firmly bound unto Lizzie C. Manogue, George W. Manogue and Frank Foley in the full and just sum of five hundred dollars ($500.00), to be paid to the said Lizzie C. Manogue, George W. Manogue and Frank Foley, her, his or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of August, in the year of our Lord one thousand, nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between William H. McCaffrey and others against Lizzie C. Manogue and others, a decree was rendered against the said William H. McCaffrey and others and the said William H. McCaffrey and others having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Lizzie C. Manogue and others citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said William H. McCaffrey and others shall prosecute said appeal

to effect, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

—— ——.

—— ——. [SEAL.]
WILLIAM H. McCAFFREY. [SEAL.]
36 JAMES B. McCAFFREY, [SEAL.]
By WILLIAM H. McCAFFREY, [SEAL.]
His Attorney.
EDWARD QUIGLEY, [SEAL.]
CATHERINE L. QUIGLEY, [SEAL.]
MARGARET R. QUIGLEY, [SEAL.]
JOSEPH QUIGLEY, [SEAL.]
MARY QUIGLEY, [SEAL.]
By EDWARD QUIGLEY, [SEAL.]
Their Guardian ad Litem.
H. V. LANSDALE. [SEAL.]

Security satisfactory.
A. A. HOEHLING, JR.,
Solicitor for Lizzie Manogue & George W. Manogue.

OSCAR LUCKETT,
Guardian ad Litem for Frank Foley.

Approved by
R. H. ALVEY,
Chief Justice Court of Appeals, D. C.

(Endorsed:) No. 1318, William H. McCaffrey *et al.*, *vs.* Lizzie C. Manogue *et al.* Bond on appeal to the Supreme Court U. S. Court of Appeals, District of Columbia. Filed August 28, 1903, Robert Willett, clerk.

37 UNITED STATES OF AMERICA, *ss:*

To Lizzie C. Manogue, George W. Manogue, and Frank Foley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein William H. McCaffrey, James B. McCaffrey, Edward Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, their guardian *ad litem*, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 28th day of August, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.

OSCAR LUCKETT,
Guar. ad Litem for Frank Foley.

Service accepted for def'ts Geo. W. Manogue and Lizzie Manogue.

E. FORREST.
A. H. HOEHLING, JR.,
Per R.

[Endorsed:] Court of Appeals, District of Columbia. Filed Aug. 28, 1903. Robert Willett, clerk.

38 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 37 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William H. McCaffrey, James B. McCaffrey, Edward Quigley, Catherine L. Quigley, Margaret Quigley, and Joseph Quigley and Mary Quigley, by Edward Quigley, their guardian *ad litem*, appellants, *vs.* Lizzie C. Manogue, George W. Manogue and Frank Foley, No. 1318, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 31st day of August, A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,097. District of Columbia Court of Appeals. Term No. 131. William H. McCaffrey, Edward Quigley, *et al.*, appellants, *vs.* Lizzie C. Manogue, George W. Manogue, and Frank Foley. Filed October 22d, 1903. File No. 19,097.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 131.

WILLIAM H. McCAFFREY ET AL., APPELLANTS,

vs.

LIZZIE C. MANOGUE ET AL., APPELLEES.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District of Columbia, construing the will of the late Hugh McCaffrey. On July 1, 1902, the appellant, William H., and his brother, James B. McCaffrey, filed their bill in equity against the appellees, and also against the appellants, the Quigleys, setting forth in material substance that they were sons of said Hugh McCaffrey, and that the defendants were his remaining heirs at law, with the exception of the appellee, George W. Manogue, who was alleged to be a purchaser and vendee of all of James B. McCaffrey's interest in his father's estate. That the said Hugh McCaffrey left a will devising certain pieces of real estate separately to each of his children, the said devises in the aggregate comprising all the real estate he owned.

That the will also contained certain bequests of person-

alty which comprised all his personal estate except his household furniture (of small value) and $100 in money.

The evidence shows this to be the true state of case; in fact it was admitted by the adult defendants, and no proof would have been necessary on that point, except that some of the defendants were infants.

The bill further recited that a son, Frank T. McCaffrey, who was left by the will certain real estate, had subsequently died, leaving a will devising all his estate, real, personal and mixed, to his sister, Lizzie C. Manogue (appellee), and his brother William H. That a daughter, Mary A. Quigley, had died, leaving by will all her estate to the appellants, Catherine L. and Edward Quigley, in trust for her children, the other Quigley appellants.

The bill further sets forth that upon proceeding to make sale of the Frank McCaffrey lot, as owners in fee simple by reason of his devise aforesaid, a doubt had arisen as to whether the said Frank T. McCaffrey, or said William H. McCaffrey, either of them, took a fee simple or only a life interest, because of the fact that the several devises of real estate were made without words of inheritance; but that the plaintiffs claimed that the said devises were intended to and did pass a fee simple to each of the devisees, because of the fact that the will imposed on Mrs. Quigley, the first devisee named, the personal duty to pay the funeral expenses and the legal debts of the testator, and that such intention resulting from the said obligation upon her the other devisees of real estate must also be found to take as fee simple devisees, the language as to the devises in all instances being the same.

The bill then proceeded to state that complainants were advised that they were entitled to have Hugh McCaffrey's will construed by the court as to the devises to Francis T. and William H. McCaffrey, and prayed that a decree be passed construing the said will, and declaring that those two took a fee simple.

The infant defendants, Frank Foley and two of the Quigley children, filed formal answers, through their respective guardians *ad litem*, and as to the adult Quigleys a decree *pro confesso* was taken.

The two Manogues filed answers: Mrs. Lizzie Manogue claiming specifically that the several devises only give a life estate, and George W. Manogue making no claim either way, but merely submitting the question of the construction of the will to the court.

Pending the appeal in this court, the appellant James B. McCaffrey died, intestate, and the land devised to him passed to the other parties to the suit either as his heirs at law, or as heirs of Hugh McCaffrey.

The will of Hugh McCaffrey shows the following devise to Mrs. Quigley:

> "I give and bequeath to my daughter, Mary A. Quigley, house number 301 at southwest corner of 4th and C streets southeast, being in lot number 5, square 970, with the store and dwelling, stock, and fixtures, and lot on which its stands; also houses number 13 and 15 6th street southeast, with lots on which they stand, being parts of lots 19 and 20, in square number 841; also any money in bank to my account at the time of my death; also any money due to me; also any building association stock. She is to pay funeral expenses and any other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery."

The devises to William H. McCaffrey and Francis T. McCaffrey are respectively as follows:

> "To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868), and lot on which it stands.
>
> "To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, be-

ing part of lot number twenty (20) in square eight hundred and forty-one (841); also my horse and buggy."

The other devises of real estate to James B. McCaffrey, Lizzie Manogue, and Frank Foley are in phraseology just the same, and there is a bequest to his grandson, Joseph Quigley, of the testator's watch and chain.

The will is dated April 30, 1896, and the testator died March 9, 1897.

The proof taken showed that the testator's personal estate was more than sufficient to pay his debts, and that quite a surplus was turned over to Mrs. Quigley.

The trial court rendered a decree reciting in substance that the several devisees took only a life estate, and decreeing specifically that Francis T. McCaffrey and William H. McCaffrey only took a life estate in their respective parcels.

Afterward the Quigleys filed a motion to strike out the recital aforesaid, on the ground that their title was not involved in the suit, and such recital was contrary to the rules of court; but the motion was overruled. An appeal was taken from the decree to the Court of Appeals, and that court affirmed the decree below.

Assignment of Errors.

The court erred in adjudging that the said Francis T. McCaffrey and William H. McCaffrey, respectively, took only life estates in the properties devised to them.

2. The court erred in giving consideration to the evidence showing the extent of the testator's personal estate.

3. The appellants, the Quigleys, assign as separate error (*a*) the recital in the decree that none of the devisees took more than a life estate; and (*b*) the order of the court overruling the motion to amend the decree by striking out such recital.

ARGUMENT.

The main question involved in this appeal was incidentally or collaterally before the Court of Appeals in McCaffrey *vs.* Little, 20 App. D. C. 116, but was by the court distinctly pretermitted, without any controlling expression of opinion, for the stated purpose of awaiting a proceeding like the present one, which should bring all the parties possibly in interest before the court. In that case the present appellants, William H. McCaffrey and James B. McCaffrey, as devisees of Frank T. McCaffrey, had brought suit against one of the present appellees, Lizzie C. Manogue, the remaining devisee, for partition by sale of the lot devised by Hugh McCaffrey to said Frank, and by him devised to those three.

When the sale was made, the purchaser, Little, set forth these doubts as to the title, and the equity court passed a decree relieving him from the purchase.

From that decree the two McCaffreys and Mrs. Manogue all appealed, she then apparently taking a different view from what she now takes; and the Court of Appeals, in affirming the decree, held that the question was of such doubtful character that a purchaser ought not to be required to assume it, using this language:

> "We are not to be understood as expressing the opinion that Francis T. McCaffrey did not take an estate in fee simple under the will of Hugh McCaffrey. On the contrary, it is probable that such was the intention of the devisor. All that we decide is that the question is not free from doubt, the title is not so clear that the appellee ought to be compelled to accept it and assume the hazard of future litigation with persons not now before the court."

Mrs. Quigley Took a Fee Simple.

The common law principle that a devisee who takes a piece of land subject to any payment, however small, gets a

fee simple, notwithstanding the omission of words of inheritance, is well settled and of ancient standing. It was announced 300 years ago in Collier's case, 6 Coke, 16 (37 Eliz.), to the following effect:

> "A man has issue, a daughter, and by his will devises part of his land to his daughter and the other part to his wife for life; after his death to his brother—paying to one 20s and to others small sums—45s in all. Adjudged that the brother had fee simple. If brother had been only required to pay so much out of the profits, he would only have taken a life estate, for he is sure to have no loss; or if directed to pay so much per annum it would be the same, for he might pay it out of the profits.
>
> "But in case at bar, after the payment he might die before satisfaction and therefore it is a fee simple."

No English case can be found controverting this, and we may incidentally say no American case.

Indeed, this court held in *King* vs. *Ackerman, 2 Black. 408*, that "when a devisee whose estate is undefined is directed to pay the testator's debts or legacies he takes an estate in fee." The court said further in this connection:

> "The rule of law which gives a fee where the devisee is charged with a sum of money is a technical dominant rule, and intended to defeat the effect of the former rule (referring to the omission of words of inheritance) which itself so often defeated the intention of the testator."

There is also a later case in England (1798), where like the present one there is a mixed devise and bequest of realty and personalty in one paragraph.

Doe vs. *Holmes, 8 Durnford & East, 1*, as follows: "I give and bequeath my house and furniture to A, she paying all my debts and legacies."

Held—

> "In cases of this kind the question has always

been whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee takes only an estate for life, but in the latter he takes a fee, otherwise he might be a loser by the devise. Here the devisee is bound to pay the debts and legacies at all events, and the charge is thrown on her in respect of the real estate."

In Sharswood's edition of Blackstone we find the following note:

"Where an estate is devised, and the devisee is subjected to a charge, which charge is not directed to be paid out of the rents and profits, the devise will carry a fee simple, notwithstanding the testator has added no words of express limitation in perpetuity. Upon this point the distinction is settled that where the charge is on the person to whom the land is devised then he must take the fee; but not where the charge is upon the land devised and payable out of it."

Citing:

Goodlitle *vs.* Maddern, 7 East, 500.
Doe *vs.* Holmes, supra.
Doe *vs.* Clarke, 8 New Rep. 349.
Roe *vs.* Dau, 3 Mau. & Sel. 522.
Baddeley *vs.* Leapingwell, Wilm. Notes, 235.
Collier's Case, supra.

The contention of the appellees is, as we are advised, that because (*a*) in connection with the devise of the land to Mrs. Quigley there is a bequest of personalty, and (*b*) the extrinsic proofs show the personal estate of the testator to have been more than sufficient to pay the charges, the devise of the real estate can not be aided by the fact of the charge upon the devisee, but must be taken strictly according to its words.

The Court of Appeals, after recognizing the rule that—

> "when a devise of lands without words of limitation or description of the extent of the estate to be taken is coupled with a personal charge upon the devisee, in effect a condition of the devise, the operation of such a charge is to enlarge the life estate that would otherwise pass, into a fee simple—"

(Opin. 22 App. D. C. 385), held that because the proofs taken by appellees showed that out of the personal estate bequeathed to Mrs. Quigley "a large surplus must necessarily remain to her after the discharge of all possible demands and expenses" (Rec. p. 394), the charge should be construed as upon the personal estate, and not upon the person (Rec. p. 395).

But the court had no right to look beyond the face of the will in determining its construction, and should have rejected the testimony as wholly incompetent to diminish the estate which the *fact of the personal charge* defined as created in Mrs. Quigley by the terms of the devise.

The court cited no authority for its reception of this evidence and ignored authoritative decisions in doing so.

> King *vs.* Ackerman, 2 Black. 408.
> Barber *vs.* Pittsburgh, etc., Railway, 166 U. S. 109.
> Allen *vs.* Allen, 18 Howard, 385.
> West *vs.* Fitz, 109 Illinois, 438.

In King *vs.* Ackerman, this court said:

> "A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, *but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.*"

And in Barber *vs.* Pittsburgh Railway this court said (Rec. p. 109):

> " Evidence of extrinsic circumstances, such as the testator's relation to persons, *or the amount and condi-*

> *tion of his estate,* may be admitted to explain ambiguities of description in the will, but *never to control the construction or extent of devises therein contained.*"

The Court of Appeals, had it rejected the extrinsic testimony as it should, must have held that Mrs. Quigley took a fee.

That the charge was upon the person, and not upon the property devised or bequeathed is certain. The language is: "She is to pay funeral expenses and any other legal debts I may owe; also to care for my lot at Mount Olivet Cemetery;" and the case is clearly within the decision in *King* vs. *Ackerman* and the other cases cited.

In *West* vs. *Fitz, supra,* the Illinois court held that the question of the sufficiency of the testator's other property to pay his debts, in nowise affected the construction of a devise accompanied with a charge on the devisee; and that the will making it a *possibility* that the devisees might have something to pay, must be construed as passing a fee simple.

The authorities are all with us on the proposition.

> 3 Powell on Devises (by Jarman), 379.
> 3 Jarman on Wills, 23.

If the limited construction of the several devises to life estates only is declared, it must result that the testator, Hugh McCaffrey, died intestate as to the remainder after the expiration of the life estates, for there is no residuary devise, or other language to dispose of the remainders. It is unreasonable to suppose that this was the testator's intention, and it gives offense to the well recognized rule that—

> "every testator in the making of his will is supposed to intend to dispose of his entire estate, and the presumption is against his intention to die intestate as to any part of it, unless such intention is plainly expressed or necessarily implied."
>
> Kennedy *vs.* Alexander, 21 App. D. C. 424.
> Hardenburgh *vs.* Ray, 151 U. S. 112.

It is shown here that everything Hugh McCaffrey owned was in some way disposed of by his will, thus adding to the presumption that he intended to dispose of all his estate.

There may be three several conditions or states of affairs arising in relation to a devisee of real estate who is charged with the payment of debts or anything else:

1. A devise merely of real estate.

2. A mixed devise and bequest of real and personal estate in the same clause of the will.

3. Separate devises of real estate and bequests of personalty; making (*a*) the charge in connection with the devise; (*b*) the charge in connection with the bequest.

As we have suggested heretofore, we understand that the counsel for appellees admit that under 1 or 3 (*a*) the fee simple will pass. We concede that under 3 (*b*) the devise would not be enlarged, because the charge would not affect the realty.

And we feel confident that all the authorities that can be cited by appellees will relate to cases arising under 3 (*b*). None other were presented in the lower court, and we know of none.

We are thus remitted to the crucial question whether, in case of a mixed devise and bequest in the same clause, the condition or charge shall be held to relate to the realty as well as to the personalty, regardless of the order in which they are enumerated, and regardless of the value of the personalty.

This question has been authoritatively settled in the affirmative.

In Doe *vs.* Holmes, supra (1798), as we have seen, the words of the will were: "I give and bequeath my house and furniture to A, she paying all my debts and legacies," and it was held that she took a fee simple in the land, even though no real estate was mentioned but the

"house," and although the furniture was also included.

In Abbott *vs.* Essex Co., 18 How. 202, the following clause in a will was involved:

> "I give to my two sons namely, John and Jacob, all my lands and buildings in Andover (excepting the land I gave to my son Thomas), which buildings consist of dwelling houses, barns, corn house, grist mill and cider mill, all of every denomination; also all my live stock of cattle, horses, sheep and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may have at my decease; and my wearing apparel, I give the same to my said sons, John and Jacob, to be equally divided between them; and in consideration of what I have given my said sons, John and Jacob, the executor of this testament (hereinafter named) is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given to my two sons, John and Jacob, to whom I give each one bed and bedding."

And it was distinctly held that the two sons took a fee simple by reason of the charge made on them, to pay out of "that part of the estate given them" the debts, etc. There is a devise of lands, without words of inheritance, and a bequest of personalty, and in the same clause a charge made, and the court held that a fee passed. If there is any difference in this case and the case at bar, it is in favor of the Quigley devise, because the will says "*she* is to pay,', whereas in the Abbott case the direction is for the executor to pay it out of the devisee's share.

Upon authority and upon principle we submit it must be held that it was the legal intention of the will that Mrs Quigley should take a fee in the land devised to her.

The Other Devisees Took Fee Simples Also.

It is also established that where from the fact of such condition in one of several devises, it is manifest the testator intended to pass a fee in such devise, the fact that in the others he has used similar terms (although without attaching conditions), will, in the absence of words of contrary import, establish a like intent in those other devises, and the beneficiaries will take in fee.

The precise point was passed upon in *Cook et al.* vs. *Holmes, 11 Mass. 529* (decided in 1814). Two parcels of land were devised to children, upon condition of payment of certain sums, and a third parcel to a grandson, without condition and without words of inheritance. The court said:

> "Here two estates in fee are created by the will clearly according to the intention of the testator; and yet he left that intention wholly unexpressed by any words made use of by him in the respective devises. It is hence probable that the testator did not know the use of technical language; and we can not infer an intention to give a life estate only to Gregory, merely because we find no estate whatever expressed."

To the same effect and in recognition of the same principle is Butler *vs.* Butler, 2 Mackey (D. C.), 96, 104, where a devise to two sons without words to indicate what estate was to be taken by them was held to be an estate in common in fee simple, because of the meaning to that effect given to similar language in another clause. The court said:

> "And inasmuch as he used the same phraseology in the following clause we think he used it in the same sense there. The authorities seem abundantly to justify us in translating a meaning which the context gives to language employed in one clause, to the same language employed in another."

To like effect is White *vs.* Crenshaw, 5 Mackey (D. C.) 113, where the court said:

> "In this case we find that when the testatrix gave a piece of land to two nephews in Baltimore by just the same language, and without the use of the word heirs or any equivalent, she *assumed* that she had given them a fee simple, and therefore went on to state what should be done in case of the death of either before they became 21 years of age. We learn in this way, what the testatrix supposed and intended to be the effect of a devise of a described piece of property, without using words of inheritance or any particular equivalent for them, and we must be guided by her lexicon, and understand her language as she defines it. We infer, therefore, from the devise that she supposed she had given a fee simple to Mrs. Emily Johnson by the same language."

And the court held that Mrs. Emily Johnson took a fee simple.

The case of *King* vs. *Ackerman*, *supra*, is also analogous, and is authority for us on this point, as on others. There the testator had devised to his son one piece of real estate "to do and dispose of as he may think proper," and another piece without such words. After deciding that the power of disposition gave a fee in the first parcel, the court said:

> "Courts have always been *astute*, as we have said, to find reasons for rescuing a will from the artificial rule established in favor of the heir at law, and will not even be *acute* in searching for reasons to restore its force, where the statute has not abolished it—"

and held that the devisee took the second parcel also in fee.

The decision in Cook *vs.* Holmes, delivered by Ch. J. Parker in 1814, has never been attacked or doubted in any court so far as we have ascertained, and, we submit, is to be taken as having settled the law on the point involved. If

followed it would seem to control this case, for if the court shall find that the legal, irrefutable effect of the charge upon Mrs. Quigley was to fasten a meaning on the words of the devise to her which the law must respect, it will not attach a different meaning to similar language in another devise.

We submit that the decree below should be reversed and the will construed as giving a fee simple to each devisee.

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FILE COPY

Supreme Court of the United States.

October Term, 1904.

No. 181.

WM. H. McCAFFERTY et al.,
Appellants,
v.
LIZZIE C. MANOGUE et al.,
Appellees.

Brief on Behalf of Appellees, Manogue.

EDWIN FORREST,
A. A. HOEHLING, Jr.,
Attorneys for Said Appellees.

WASHINGTON, D. C.
Press of Gibson Brothers.
1905.

Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIAM H. McCAFFREY *et al.*,
APPELLANTS,
v.
LIZZIE C. MANOGUE *et al.*

No. 131.

BRIEF ON BEHALF OF APPELLEES, MANOGUE.

THE CASE.

The bill in this case was filed by William H. McCaffrey and James B. McCaffrey, sons of the late Hugh McCaffrey, and devisees under the will of the late Frank T. McCaffrey, to construe the will of Hugh McCaffrey, which, among other things, contains the following provisions:

"I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5, in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square number 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock.

She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetery.

"I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight(868).

"To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

"To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

"To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, being part of lot number twenty (20) in square eight hundred and forty-one (841), also my horse and buggy.

"To my grandson, Joseph Quigley, my watch and chain." (*R.*, *3*).

The contention is made by appellants that, by the clauses quoted, the devisees named took an estate in fee and not a life estate (*R.*, *2–6*). The defendant Lizzie C. Manogue filed answer, claiming that under said devise the parties named only took a life estate, and the defendant George W. Manogue submitted the question to the determination of the court. After replication, testimony was taken which showed, among other things (*R.*, *14–24*), that the personal estate of Hugh McCaffrey was more than sufficient to pay his debts, and that Mary A. Quigley or her estate received the surplus, amounting to over two thousand dollars.

On hearing, the trial court decreed that the complainants acquired only an estate for their respective lives in the certain property devised to them by the will of their father, and in a formal recital in said decree in construing

the will, as asked for by the bill of complaint, the decree recited that the respective devisees under the will alluded to took and acquired each only an estate for his or her life, and that neither of the devises was enlarged from a life estate to an estate in fee-simple by reason of anything in the will contained or by reason of any charge made or duty imposed upon Mary A. Quigley, one of the devisees (*R.*, *25–26*).

From that decree, an appeal was taken to the Court of Appeals of the District of Columbia, with the result that said decree was affirmed (*R.*, *36;* Opinion, *R.*, *29–35*). From that decree of affirmance, an appeal was taken to this court.

Errors Assigned.

The appellants, in the brief filed herein, assign error:

1. In adjudging that Francis T. McCaffrey and William H. McCaffrey, respectively, took only an estate for life in the property devised to each.

2. In considering evidence as to the extent of testator's personal estate.

3. In reciting in the decree that none of the devisees named in the will took more than a life estate; and in refusing to amend the decree by striking such recital therefrom.

BRIEF.

Bearing in mind that the will of Hugh McCaffrey, here under consideration, contained no words of limitation or inheritance, the following propositions and questions are presented by the present appeal:

1. The language of each of the several devises, standing alone and unaided by resort to legal implication, admittedly pass but a life estate.

2. Does the direction that Mary A. Quigley pay funeral expenses and debts have the effect of enlarging the life estate in the real estate devised to her to a fee-simple?

3. If it has, does that enlargement by implication extend to the other devises containing no such direction?

4. Is the recital contained in the decree unauthorized, and is such objection reviewable?

The propositions and questions will be considered in the order stated.

I.

A Devise Without Words of Limitation or Inheritance Passes only a Life Estate.

This proposition apparently is not, and certainly cannot be, successfully controverted. The authorities sustaining it are uniform in every jurisdiction, and the same rule of decision obtains in the District of Columbia, with the exception only of cases coming within the provisions of the Code, of which, however, the case at bar is not one.

2 Jarman on Wills, p. 267.
2 Redfield on Wills, p. 321.
Farrar *v.* Ayres (*5 Pick., 404*).
McAleer *v.* Schneider (*2 App. D. C., 461*).
McCaffrey *v.* Little (*20 id., 116*).
Wright *v.* Denn (*10 Wheat., 204, 236, 237*).

And this is so notwithstanding the testator in the will may have declared an intention to dispose of his whole estate (2 Jarman on Wills, p. 267; Wright *v.* Denn, *supra*), although here there is absolutely no expression by testator of any intention to dispose by will of his entire estate in the property, nor does he attempt to dispose by will of his entire property.

II.

Is the Devise to Mary A. Quigley Enlarged by Legal Implication to a Fee?

Admitting the first proposition, appellants reply that Mary A. Quigley took her devise *charged*, either in respect of the real estate devised to her or in respect of her personally as a *devisee*, with the payment of funeral expenses and debts of testator, and that therefore her devise is by legal implication *enlarged* to a fee.

In discussing this particular contention, the fact that said devisee was, in the same connection, requested or directed by testator to "*care* for my lot in Mt. Olivet cemetery" is of no importance.

Such direction, indefinite alike both as to quantum or object, as well also invalid, constitutes neither a trust nor charge enforceable against the devisee (Buggens *v.* Yeates, 8 Vin. Abr., 72; 1 Jarman on Wills, p. 387 *et seq.*, and cases cited).

The will of Hugh McCaffrey, the construction of which is involved in the present appeal, was, also, considered by the Court of Appeals of the District of Columbia in another and prior controversy, wherein a purchaser at judicial sale of certain of the real estate of said testator sought to be relieved of his purchase because of the uncertainty of the legal character and extent of the estate devised; and he was so relieved. (McCaffrey *v.* Little, *20 App. D. C., 116.*)

In that case it was apparently contended, in opposition to the relief sought by the purchaser, Little, that the charge to pay debts was upon the land devised, and that such charge operated to enlarge the estate, by implication, to a fee, the case of Cook *v.* Holmes (*11 Mass., 529*) being then urged in support of the contention; but the Court of

Appeals pointed out the distinction between a charge of debts upon lands devised, as not having the effect so contended for, and a charge of debts upon the devisee personally, in which latter case there are authorities sustaining the contention.

The present appellants now insist, however, that the devisee, Quigley, is charged *personally* with the payment of funeral expenses and debts.

It is quite clear under the authorities that unless the claim last asserted can be made applicable to the real facts of the case, the doctrine asserted in Cook *v.* Holmes will furnish no support to appellants' case, as that decision is in conflict with the uniform current of authority in this country.

The true rule of decision will be found stated in Wright *v.* Denn (*10 Wheat., 204, 236–7*), in an exceedingly able and instructive opinion by Mr. Justice Story.

There the court expressly held that a charge of legacies on lands devised would not enlarge the devise to a fee, and held, further, that a devise of "all and singular my lands, messuages and tenements, * * * freely to be possessed and enjoyed," passed an estate for life only.

In the case of Jackson *v.* Harris (*8 Johnson N. Y., 142*) the devise under consideration was in the following words:

"To my beloved son Henry * * * all this certain lot of land, which I now possess, and is known by No. 136, together with all my farming utensils, and likewise the 108 stock belonging to my estate."

Then followed specific legacies, all of which were directed by testator "to be raised and levied out of my estate."

The court, in its opinion, stated:

"If the personalty was sufficient to pay the legacies, that fund must first be resorted to; for it is the natural and legal fund for the payment of debts and legacies."

It was accordingly there held that the estate was not enlarged to a fee.

In the case of Burlingham *v.* Belding (*21 Wend., 463*) testator bequeathed certain personal property to his wife for life, and after her death to his son "Lawrence, *who is to take care of his mother during her natural life.*"

Following that provision was a devise of certain land, without words of perpetuity, to his son Silas, and then followed a devise of the land in suit to his said son Lawrence, likewise without words of perpetuity.

It was there contended that the charge upon the son Lawrence, "to take care of his mother during her natural life," enlarged the devise to him of the real estate to a fee; but the court declined to so rule, and held what is thus accurately expressed in the syllabus:

"A devise of lands without words of perpetuity, in a will made previous to the Revised Statutes, will not be construed to give *a fee by implication*, although there be a *personal charge* imposed upon the devisee, if there be *a fund other than the realty*, to which the devisee may look for indemnity, and in immediate connection with which the charge is imposed."

In this connection attention is asked to the case of Turnburke *v.* Parker (*2 MacA., 444*), where it was held that a charge of legacies (*i. e.*, debts) upon land will not exonerate the personal estate, unless the will shows a clear intention to so change this pecuniary liability—the personalty being the fund primarily responsible for debts (legacies).

The case of Moor *v.* Mellor (*5 Durnford & East, 284*) involved the construction of a will containing the following devise:

"*All* the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever,

and also all my goods, chattels and personal estate of what nature or kind soever, *after payment of my just debts and funeral expenses*, I give, devise and bequeath the same unto my wife, Sissily Carr; and I do hereby nominate and appoint her, my said wife, sole executrix of this my will."

There the same contention was urged as here, and couched in almost identical words:

"This estate is subjected to debts in the hands of the devisee, and therefore she must take a fee. Every devise is supposed to mean a benefit to the devisee. * * * In questions of this kind, courts have never examined the comparative value of the charge and the estate charged: it is sufficient if *by possibility* the devisee *may* be a loser by taking only an estate for life. * * * The devise of the real and that of the personal estate are coupled together, and this charge is annexed to both" (*p. 286*).

The court, however, overruled the contention, stating in conclusion:

"Whatever our conjectures may be (and privately speaking I think the devisor meant to give an estate in fee to his wife), we are not at liberty to follow those conjectures, but are compelled by the authorities to say that she only took an estate for life under her husband's will" (*p. 288*).

The case was then taken to the Court of Exchequer Chamber, where the judgment of the Court of King's Bench (*supra*) was reversed (*1 Bosanquet & Puller, 558*); whereupon it was removed to the House of Lords upon writ of error, where the first judgment, that of the Court of King's Bench, was reinstated and affirmed. The opinion of the judges, delivered by Macdonald, Ch. B., concluded:

"I am of opinion that * * * the weight of authority obliges me to conclude that Sissily Carr took only an estate for life" (*2 Bosanquet & Puller, 247, 253*).

The case of West *v.* Fitz (*109 Ill., 438*), cited by appellants, is neither useful nor instructive, since the opinion there points out that the omission of words of limitation or inheritance "is wholly without significance, either in a deed or will," by virtue of the provisions of the law of that State (*p. 436*).

In the case of Abbot *v.* Essex Co. (*18 How., 170*) relied upon by appellants, the will devised certain real estate, described as "*all* my lands and buildings," and also certain personal estate, to his two sons, John and Jacob, to be divided equally between them. The son John was appointed executor, and *in consideration* of the above provisions for said two sons the said executor was ordered to see that all just debts, funeral charges, and legacies be paid out of that part of the estate given to said two sons. The will also directed that the share of the one of the sons who should die first, without lawful heirs, should accrue to the survivor and his heirs.

The court held that the description of the devise employed in the will, namely, "estate" or "that part of my estate," was sufficient to carry the whole interest of the testator in the subject of the devise, namely, a fee. The opinion added that, moreover, the intention of a testator must be drawn from the whole context of his will. It further found that the son John was charged *personally* with the payment of all debts and legacies, the testator calling it the "consideration" to be paid for that part of the estate given.

The appellants further rely upon the case of King *v.* Ackerman (*2 Black, 408*).

An examination of the will involved and construed in that case will disclose that it is essentially different from the one here under consideration. There the testator thus directed:

"*In the first place*, I give and bequeath unto my son, Benjamin L. Benson, all that estate now occupied by

George Williams, to do and dispose of as he may think proper.

"I also give and bequeath unto my son, Benjamin L. Benson, the homestead where I now live, situated on Harlem river.

"*Secondly.* My will and intention is, that my son, Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of $1,500.

"*Thirdly.* The income of these legacies, and also of my estate, real and personal, I give unto my loving wife, Maria Benson, during her widowhood, to do and dispose of as she may think proper."

It will be observed that here there was a specific devise to the son of certain real estate, and, in a separate paragraph, a specific charge upon said son (devisee) of the payment of $1,500. The testator provided no fund out of which said payment could be made, but made the payment a charge upon the devisee *personally*.

In the opinion it is pointed out that the testator not only postponed the possession and enjoyment of the land devised to the son for an indefinite time (*i. e.*, widowhood of the wife), but charged him with the payment of a gross sum of money ($1,500) which he became personally liable to pay, for land that he might never personally possess or enjoy.

This reasoning of the opinion is both involved and obscure; the contingency of the devisee being charged personally with the payment of a gross sum of money for land that he might never personally possess or enjoy, would seem to be based upon the theory that the devise of the estate to the wife, during her widowhood, "to do and dispose of as she may think proper," operated to pass the fee, and that a disposition of the estate by her would defeat the remainder to the son.

Such construction, however, would defeat the holding of the court that the will operated to pass the fee to the

son; and, moreover, the contingency mentioned could not arise under the will, since the charge upon the son (devisee) personally did not take effect until after the death of the wife.

It may also be noted that in connection with one of the two pieces of real estate devised to the son, the testator fixed the quantum and character of the devise by using the description "*all* that estate now occupied by George L. Williams, *to do and dispose of as he may think proper.*"

This might well be held to pass the entire estate. The charge upon the devisee personally occurred in a separate paragraph, and the court concluded that the son took the remainder estate in fee in both parcels, even though the devise of the second parcel omitted the words "to do and dispose of as he may think proper."

It is submitted that neither of the cases relied upon by appellants, referred to and considered, is here controlling.

The situation in this case is substantially this: Testator, having given his daughter, Mary, practically all of his personal estate—in fact, all except a horse and buggy and watch and chain, but which the testimony shows he disposed of to a son before his death—very naturally and properly added that (out of the personal estate) she should pay his funeral expenses and debts. The personal estate so given her was largely in excess of funeral expenses and debts; in fact, she and her estate received something over $2,000 after the collectors and executors had paid the funeral expenses and debts. The administration of the estate shows that said debts were discharged in the usual and proper (legal) manner, namely, the collectors and executors discharged and paid them out of the personal estate (the fund primarily liable) and turned over to the legatee the balance.

The situation is well summed up in the opinion herein below:

"As we have before suggested, the testator died practically free from debt; he knew of what his personal property consisted when he gave it all, substantially, to Mary A. Quigley, in connection with an apparently excessive share of his landed property; and that a large surplus must necessarily remain to her after the discharge of all possible demands and expenses. Presumably, he knew that this personal property was first charged by law with the payment of debts and expenses. Having made the devise and bequest in one sentence, he then added the separate sentence: 'She is to pay funeral expenses, and any other legal debts I may owe,' etc.

Under all the surrounding circumstances, the practical effect of this clause would seem to be the same, substantially, as if he had expressly directed the payment to be made out of said personal estate, or had made the bequest of the same after the payment of funeral expenses and debts." (*R.*, *35*.)

It is forced, not to say strained, reasoning to pretend, in this case, that the charge was upon either land or devisee. The direction to pay debts was in immediate connection with the gift of the personalty.

The provision for paying debts was in no sense or way the result of the devise of the land.

Appellants now contend that, under the authorities, evidence touching the amount of the estate, or the relative value of the *burden* of charge upon the devisee and the *benefit* of the devise, cannot control the construction or extent of the devise, and it is now assigned as error that the court gave consideration to such evidence.

In reply to such objection, it is to be observed that the rule of decision so contended for, has its application to an ordinary devise of real estate accompanied by a charge of some kind upon the devisee personally—a situation quite different from that here uner consideration.

Here the testator gave and bequeathed to his daughter, Mary A. Quigley, practically his entire personal estate;

and, in that immediate connection, directed her to pay funeral expenses and legal debts—the will contained no legacies.

The proofs in the case show that in the ordinary course of administration of this estate by the collectors and executors, the personal estate was collected, reduced to possession, and administered; the funeral expenses and legal debts paid, and the balance, in excess of $2,000, paid over by the executors in accordance with the gift and bequest thereof to Mary A. Quigley. (*R.*, *14–24.*)

It was evidently not contemplated during the administration of this estate that the direction to pay funeral expenses and legal debts was a charge personally upon the devisee and legatee, Quigley, or that it was other than a direction that said daughter should have the personal estate, described, subject to the payment of debts, as in the ordinary course of administration.

If the devise was upon condition of payment by devisee as a charge upon her personally, it was never performed.

The evidence now complained of was clearly competent and material in respect of the issues involved in the case; and it is quite clear that appellants so then regarded it, inasmuch as the record discloses no objection whatever to the introduction of the evidence—indeed the appellants introduced evidence upon the same matter. (*R.*, *21–24.*)

Furthermore, the evidence having been introduced on both sides, without objection, there was no motion before the trial court to exclude it; it was not even assigned as error in the court below, and it is submitted that it is now too late to urge, for the first time, error in respect of the admission or consideration of such evidence, so far as the same may have any controlling bearing upon the questions under consideration.

It is submitted that the devise to Mary A. Quigley cannot be enlarged, by implication, to a fee.

III.

Even if the Quigley Devise is so Enlarged, the Other Devises in the Will are not Aided Thereby.

Appellants assert, first, that the Quigley devise was enlarged to a fee; and, second, that that enlargement must likewise be held to extend to the other devises contained in the will, and this notwithstanding the fact that such other devises contain no conditions or limitations whatever.

In support of such contention, appellants cite the case of Butler *v.* Butler (*2 Mack, 96–104*). That case, however, was totally different in its facts, involving a question of construction merely, and having no relation whatever to an enlargement of an estate by legal implication because of any charge made in respect of the devise, or in respect of the devisee, and has here no useful application.

The same thing is true in the case of White *v.* Crenshaw (*5 id., 113*), where the court found, from the entire will, an intention by testatrix to pass a fee in respect of several devises of real estate; and that the language used by testatrix should be understood and applied as she had defined it in the will.

So, in the case of King *v.* Ackerman, *supra*, two separate parcels of real estate were devised to the son of testator, and, in another paragraph of the will, the son (devisee) was charged personally with the payment of a named amount; and this personal charge (together with the other matters referred to in that case) was held to pass a vested remainder in fee to the devisee as to all the property devised to him.

Finally, appellants cite the case of Cook *v.* Holmes (*11 Mass., 529*), as controlling authority for the proposition that if by reason of the limitation or condition attached to the devise and bequest to Mary A. Quigley, her

devise is enlarged, by implication or presumption, to an estate in fee, such enlargement is to be extended throughout the entire will as to every devisee named therein, even though as to the latter the devise is unaccompanied by any limitation, condition, or charge, of any kind whatever.

A mere reading of the opinion, however, in that case will show that it is in no sense decisive of the question, since there the testator had expressly announced that the purpose of his will was to make *equal* provision for the several beneficiaries, and the court simply made that declaration of intention effective.

Hence, in the present case, it cannot be said that any one devise is given character by any other, and inasmuch as said other devises contained no words of limitation or inheritance, and cannot be extended by legal implication, it must necessarily result that they respectively passed a life estate only.

IV.

The Decree is not Objectionable by Reason of any Recitals Therein.

Objection is urged, by certain of the appellants, as to the form of decree in this case, in that it is therein recited that the several devisees took and acquired each only a life estate for his or her life, respectively, and that none of said devises was enlarged to a fee by reason of anything in the will contained; or by reason of any charge made or duty imposed upon Mary A. Quigley.

This objection, it is submitted, is purely technical and without merit.

The bill was filed specifically praying for the construction of the will of Hugh McCaffrey, and in the averments thereof it will be found stated that:

"Because there was by the said will imposed upon the said Mary A. Quigley the personal duty to pay his funeral expenses and the legal debts of the testator, an estate in fee simple passed to her * * * although there *was* in said devise no words of inheritance, and * * * such intention must be found to have existed in respect to the several other devises so by said will made." (*R.*, *6.*)

The question principally argued both below and here is whether or not the devise to Mary A. Quigley was enlarged to a fee, that question being of prime importance in order to a determination of the remaining questions.

In a suit, the only purpose of which is the construction of a will, it is, to say the least, difficult to see just how a court could enter a decree without in some way stating the true construction, and applying that conclusion to the particular subjects-matter to be adjudicated.

This is all that was done in the present decree, and it would seem to be unobjectionable, so far as its recitals are concerned.

The further objection urged by appellants, namely, alleged error of the court in overruling motion to modify the decree by striking therefrom the recitals above referred to, needs no comment, as it is not an appealable order, as has been repeatedly held by this court; and, even if it were, no appeal was taken therefrom (*R.*, *27–8*).

The decree below is right, and should be *affirmed*.

Respectfully submitted.

EDWIN FORREST,
A. A. HOEHLING, JR.,
Attorneys for Appellees, Manogue.

WASHINGTON, D. C., *January 9, 1905.*

Supreme Court of the United States.

No. 131.—October Term, 1904.

William H. McCaffrey, Edward Quigley, et al., Appellants, *vs.* Lizzie C. Manogue, George W. Manogue, and Frank Foley.	Appeal from the Court of Appeals of the District of Columbia.

[February 20, 1905.]

The question involved in this case is the construction of the will of Hugh McCaffrey, deceased. It was duly admitted to probate and recorded in the Supreme Court of the District. It is as follows:

"Washington, District of Columbia,
April Thirtieth, 1896.

"In the name of God, being now in good health and sound in mind and body I hereby certify and declare this to be my last will and testament, hereby annulling and revoking any and all wills previously made.

"I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5, in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock. She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetrey.

"I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight (868).

"To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

"To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street, N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

"2. To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, being part of lot number (20) in square eight hundred and forty-one (841), also my horse and buggy.

"And to my grandson, Frank Foley, I give and bequeath house number one hundred and twenty-one (121) Eleventh street, S. E., being in lot number fourteen (14), square number nine hundred and sixty-eight (968), and lot on which it stands.

"To my grandson Joseph Quigley, I give and bequeath my watch and chain.

"I hereby name and appoint as executors of this my last will and testament, John E. Herrell and Patrick Maloney.

"All the real estate herein described is located in the city of Washington, District of Columbia.

HUGH MCCAFFREY. [SEAL.]"

The devisees in the will were the only heirs of the testator.

On the 10th of July, 1897, Mary A. Quigley died, leaving surviving four children, the appellants Catherine L., Margaret, Mary and Joseph Quigley. Edward Quigley, her husband, also an appellant, survived her. She left a will, which was duly admitted to record, by which she devised all her estate to Catherine L. and Edward Quigley in trust for her children. Francis T. McCaffrey, son of Hugh, and one of the devisees in the latter's will, died October 20, 1898, leaving as heirs at law his brothers and sisters, the children of his deceased sister, Mary A. Quigley, and his nephew, Frank Foley. He left a will, by which he devised and bequeathed all of the property to his sister, Lizzie C. Manogue, and his brothers William A. and James B. McCaffrey, "absolutely and in fee simple, according to the nature of the property, as tenants in common, but not as joint tenants." At the time of his death he was seized and possessed of the real estate devised to him by his father.

James B. McCaffrey has sold and conveyed the lot devised to him to the respondent George W. Manogue. Upon an attempt to sell the property devised by Francis T. McCaffrey a doubt was raised as to the extent of the interest devised to him and the other devisees by the will of H. McCaffrey, whether an estate for life or in fee simple. This suit was brought "to have it determined what estate each of the said devisees took thereby, and to have their title quieted as against any person or persons who may claim adversely to the same as heirs of said Hugh McCaffrey, or under such heirs."

It was decreed by the trial court that only life estates were devised by the will, and the decree was affirmed by the Court of Appeals. (22 App. Cases D. C. 385.)

Mr. Justice MCKENNA, after stating the case, delivered the opinion of the Court.

It will be observed that the devises are expressed in exactly the same way. To Mary A. Quigley, however, there are given several pieces of real estate, the money of the testator in bank and his building association stock. She is charged with the payment of the testator's funeral expenses and debts; also with the care of his cemetery lot. Nevertheless, neither of the lower courts distinguished between the devisees—to all was applied the

rule of law that a devise of land without words of limitation or description gives a life estate only. The Court of Appeals held that the charge or burden upon Mary A. Quigley to pay the funeral expenses and debts of the testator was offset by the gift to her of personal property. It is insisted that the ruling is contrary to the decision in *King* v. *Ackerman*, (2 Black, 408.) It is there said: "The rule of law which gives a fee where the devisee is charged with a sum of money is a technical dominant rule, and intended to defeat the effect" of the artificial rule established in favor of the heir at law, that an indefinite devise of land passes nothing but a life estate. It was, however, apparent to the Court of Appeals that, to follow *King* v. *Ackerman*, would not execute the intention of the testator by opposing one technical rule by another, but would discriminate between his heirs and destroy the equality between them which it was the purpose of the will to create. To effect this equality the court selected, not the "dominant rule," whose virtue this court pointed out, but the other, regarding it the most commanding. It is altogether a strange tangle of technicalities. Apply either of them, or both of them, and we defeat the intention of the testator. Are we reduced to this dilemma? We think not; nor need we dispute the full strength of the rule in favor of the heir at law. It is not an unyielding declaration of law. It cannot be applied when the intention of the testator is made plain. It cannot be applied when the purpose of the testator, as seen in the will, cannot be carried out by a devise of a less estate than the fee. (*Bell County* v. *Alexander*, 22 Texas, 350.) The policy of the law in favor of the heir yields, we repeat, to the intention of a testator if clearly expressed or manifested. That policy, the reason for it and the elements of it, is expressed strongly by Mr. Justice Story in *Wright* v. *Denn*, (10 Wheat. 204, 227, 228):

"Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used or from other parts of the will, there is a plain intention, because if it be doubtful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put *in a clear and unambiguous shape*." (Italics ours.)

We think the intention of McCaffrey is "put in a clear and unambiguous shape." He intended to dispose of his whole estate. It is true there is no introductory clause expressing such intention, but there is no residuary clause indicating that he intended to pass less than all of his estate. And all of his heirs at law were his devisees. In other words, the very heirs for

whom the rule is invoked are those among whom he distributed his property, and surely he intended a complete distribution—to vest in each the largest interest he could give, not assigning life estates with residuary fees to the very persons to whom such life estates were devised. In other words, making each heir the successor of the other and of himself. It was evident to the Court of Appeals—it is evident to us—that he intended to make his heirs equal. Of this purpose the charge upon his daughter, Mary A. Quigley, is dominantly significant, not only in effect, but in its expression. She is given a greater quantity of real estate than the other devisees. She is given personal property besides, but, declared the testator, "she is to pay funeral expenses and other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery." That charge was not intended to enlarge the quantity of interest in the real estate devised in the sense contended for, but to make an equality between her and the other heirs and devisees, and, we repeat, that was his especial purpose. In other words, he gave her more property, not a larger interest in it. The devise to his grandson, Frank Foley, shows how carefully the testator regarded his heirs. Surely, as he regarded that grandchild as inheriting the rights which his mother might have inherited, he did not intend a disposition of his property which precluded his other grandchildren of inheriting through their parents. And this will be the result if the appellees are right. No devisee possesses an estate which can be devised to or inherited by his or her children.

Against the effect of the heirs at law of the testator being also his devisees, it may be said that it has been held that, though a testator has given a nominal legacy to his heir or declared an intention to wholly disinherit him, the inflexibility of the rule in favor of the heir has been enforced. (*Frogmorton* v. ~~*Right*~~, 2 W. B. 1045; *Right* v. *Sidebotham*, Douglas, 759; *Roe* d. *Peter* v. *Daw*, 3 M & Sel. 518.)

In *Right* v. *Sidebotham*, Lord Mansfield felt himself constrained to enforce the rule, but he observed in protest: "I verily believe that, in almost every case whereby in law a general devise of land is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that expressed in words of limitations, the words tantamount are necessary to pass an estate of inheritance." And he hence concluded that words tending to disinherit the heir at law, unless the estate is given to some one else, was not sufficient to prevent the heir from taking.

Lord Ellenborough in *Roe* d. *Peter* v. *Daw* followed the rule, and declared also that he thereby probably defeated the intention of the testator. It is a strange conclusion from the facts and needs the sanction of those great names to rescue it from even stronger characterization. Lord Mansfield

spoke in 1781, Lord Ellenborough in 1815. We cannot believe, if called upon to interpret a will made in 1896, when the rights of heirs are not so insistent and the rule in their favor lingers, where it lingers at all, almost an anachronism; when ownership of real property is usually in fee, and when men's thoughts and speech and dealings are with the fee, they would hold that the purpose of a testator to disinherit his heirs could be translated into a remainder in fee after a devise of a life estate to another.

But, perhaps, even the severe technicality of those cases need not be questioned. In the construction of wills we are not required to adhere rigidly to precedents. We said in *Abbott et ux.* v. *Essex Co.*, (18 How. 202, 213:)

"If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant."

To like effect is *Cook et al.* v. *Holmes et ux.*, (11 Mass. 527,) where the will passed on contained the following devise: "*Item.* To his grandson Gregory C., only child of his son Daniel C., deceased, a certain piece of land in Watertown, containing about 6 acres." The will contained devises to other sons of pieces of real estate, charging them with payment of certain legacies. The will concluded as follows: "The above-described legacies, together with what I have heretofore done for my children and grandchildren, make them nearly equal, and are their full portion of my estate."

The will, therefore, is similar to the will in the case at bar. Equality between the devisees is as much the purpose of one as the other, though it is expressed in one and deduced as an implication in the other. Chief Justice Parker, in delivering the opinion of the court, said: "The quality of the estate which Gregory C. took by the devise must be determined by the words of the will, taken together, and receiving a liberal construction, to effectuate the intention of the testator as manifested in the will."

Further: "The words of the particular devises to Gregory, considered by themselves, certainly give no inheritance." And stating the rule of law to be, as contrasted with the popular understanding, "that such a devise, standing alone, without any aid in the construction from other parts of the will, would amount only to an estate for life in the devisee," added:

"But it is too well established and known to require argument or authorities now to support the position that devises and legacies in a will may receive a character, by construction and comparison with other legacies and devises in the same will, different from the literal and direct effect of the words made use of in such devise; [Cases were cited in note] and this because

the sole duty of the court in giving a construction is to ascertain the real intent and meaning of the testator, which can better be gathered by adverting to the whole scope of the provisions made by him for the objects of his bounty than by confining their attention to one isolated paragraph, probably drawn up without a knowledge of technical words or without recollecting the advantage of using them."

The devise to Gregory C. was held to be of the fee.

From these views it follows that the decree of the Court of Appeals must be and it is reversed, and the case is remanded to that court with directions to reverse the decree of the Supreme Court, and remand the case to that court with directions to enter a decree in accordance with this opinion.

Mr. Justice PECKHAM dissents.

True copy.

Test:

Clerk Supreme Court, U. S.